Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

BRUCE ISAACKS and DARLENE A. WHITTEN,
Petitioners

v.

NEW TIMES, INC., d/b/a DALLAS OBSERVER, DALLAS OBSERVER, L.P., ROSE FARLEY, JULIE LYONS, and PATRICK WILLIAMS,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI

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February 3, 2005

QUESTIONS PRESENTED

I.

Whether the Texas Supreme Court erred in holding that in *Hustler Magazine v. Falwell* the United States Supreme Court "implicitly rejected" a literal application of the actual malice rule of *New York Times v. Sullivan* in defamation cases involving purported satire.

II.

Whether the opinion of the Texas Supreme Court erroneously expands the rule in *New York Times v. Sullivan* beyond its intended scope effectively immunizing media defendants from liability for libel of a public official as long as the publication is defended as an attempted satire, even if the defamatory false statements were made with actual "knowledge of the falsity or reckless disregard for the truth," and even if the article is formatted, labeled, and placed in a context to be taken as a report of actual events by an "average reader of ordinary intelligence."

III.

Whether the Texas Supreme Court's opinion improperly equates the hypothetical "reasonable man" of the negligence case with the "average reader of ordinary intelligence" discussed in *Hustler Magazine v. Falwell* and thereby effectively immunizes media defendants from liability for libel as long as the defendant claims the offending article was satire.

IV.

Whether the Texas Supreme Court erred in finding that no fact question for a jury was presented and in holding as a matter of law that no "average reader of ordinary intelligence" could have believed that the offending article was a report of actual events.

V.

Whether the Texas Supreme Court erred in holding that Petitioners failed to raise summary judgment evidence of constitutional "actual malice" even though the summary judgment proof demonstrated that the Respondents had actual knowledge that the offending news article was untrue, and even though the summary judgment proof demonstrated that the article was believed to be an account of actual events by many "average readers of ordinary intelligence" including members of the print and broadcast media, lawyers, college professors, college students, and others.

VI.

Whether the Texas Supreme Court erred in holding that *Hustler Magazine v. Falwell* forecloses the use of evidence of common law malice as evidentiary of constitutional malice.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs below) are Bruce Isaacks, Criminal District Attorney of Denton County, Texas and Darlene A. Whitten, Judge of the County Court At Law Number One, Denton County, Texas, the statutorily designated Juvenile Court for Denton County, Texas.

Respondents (Defendants below) are New Times, Inc. (owner/publisher of an alternative weekly newspaper), d/b/a Dallas Observer (the weekly), Dallas Observer, L.P. (owner/publisher), Rose Farley Reporter), Julie Lyons (Editor), and Patrick Williams (Managing Editor).

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORAI

Bruce Isaacks and Darlene A. Whitten respectfully petition for a writ of certiorari to review the opinion and judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court in favor of the Defendants (Respondents herein) is reported at 146 S.W.3d 144. See Appendix 1. The opinion of the Court of Appeals for the Second District of Texas ruling for Plaintiffs (Petitioners herein) is reported at 91 S.W.3d 844. See Appendix 3.

JURISDICTION

The Texas Supreme Court handed down its decision on September 3, 2004 and denied motion for rehearing on

November 5, 2004. Order denying rehearing attached as Appendix 2. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are United States Const., Amend. 1; Tex. Const. art. 1 §§ 8, 13; Tex. Const. art V, § 1-a; Tex. Civ. Prac. & Rem. Code § 73.01; and Tex. Loc. Gov't Code §§ 87.011, 87.013. Pursuant to Sup. Ct. Rule 14(1)(f) these provisions are contained in Appendix 5.

STATEMENT OF THE CASE

Procedural history

The defamatory article was published on November 11, 1999. Petitioners filed suit on November 30, 1999. Respondents filed motions for summary judgment claiming (1) that the article was protected opinion in the nature of a satire or parody, and (2) that there was no evidence of actual malice. The trial court denied these motions in separate hearings, and Respondents took interlocutory appeals to the Second Court of Appeals of Texas, sitting at Fort Worth.[1] and on November 21, 2002 the court of appeals affirmed, holding in pertinent part (1) that a genuine issue of material fact exists whether a reasonable reader of average intelligence could construe the article as a statement of actual fact; (2) that the test for actual malice adopted by the Supreme Court in *New York Times, Inc. v. Sullivan*[2] applies to claimed satire and that the *Observer* failed to establish lack of actual malice as a matter of law; (3) that satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but

[1] The appeals were consolidated.
[2] 376 U.S. 254 (1964).

instead is subject to scrutiny as to whether it makes a defamatory statement of fact; (4) that there is evidence raising a genuine issue of material fact that the article fails to provide adequate notice to a reasonable reader of average intelligence that it was a satire, and that such a reader could conclude that the article made defamatory statements of fact; and (5) that the *Observer* failed to establish as a matter of law that a reasonable reader of average intelligence would perceive or understand that the publication did not make false statements of actual fact concerning Isaacks and Whitten.

Respondents timely filed a petition for review with the Texas Supreme Court.[3] By opinion dated September 4, 2004 that court issued its opinion and judgment reversing and rendering judgment for the media defendants holding that (1) as a matter of law a "reasonable reader" could not have believed the article to depict actual facts about Petitioners; (2) as a matter of law Petitioners did not produce evidence of actual malice; (3) Petitioners' summary judgment evidence that many[4] who read the article and believed it to be true is not competent to raise an issue of fact for the jury that a reasonable reader of average intelligence could believe the article to be true; (4) the reasonable reader of average intelligence discussed in *Hustler Magazine v. Falwell*[5] is identical to the fictional "reasonable man" of negligence law, and this fictional character never acts unreasonably and "can tell the difference between satire and sincerity;" (5) in *Falwell,* the United States Supreme Court "implicitly rejected a literal application of the actual malice rule to works involving satire or parody;" (6) instead of a literal application of the

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[3] The court granted the petition and requested briefs on the merits.

[4] These readers were alleged by Petitioners to be "reasonable readers of average intelligence."

[5] 485 U.S. 46 (1988).

New York Times actual malice rule, the correct inquiry is whether "the publisher knew or had reckless disregard for whether the article could reasonably be interpreted as stating actual facts." (7) evidence of common law malice cannot be taken as circumstantial evidence of constitutional actual malice, even when coupled with the publisher's admission that she knew the article was untrue when published.

Petitioners herein filed a timely motion for rehearing[6] which was denied by order dated November 5, 2004, and now seek relief from this Court.

Facts—the "madness article"

On November 11, 1999, the *Dallas Observer*, a newsweekly that by its own description is devoted to hard-hitting investigative journalism,[7] published an article in its newspaper [the "Madness article"] and on its web site[8] (CR 171-172[9]). The article was published under the heading of

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[6] Appendix 2.

[7] The New Times website claims that its thirteen newsweeklies "make a difference in our communities, by breaking news, by taking time to interpret it, and by offering readers a weekly respite from the hurried fact-finding of daily journalism.... As many daily papers shorten stories and hire consultants to tell them what to print, New Times papers thrive by cultivating networks of local sources, generating truly original story ideas, and digging into stories rather than skating across their surface." www.newtimes.com/overview.html. The *Dallas Observer* is portrayed as a "paper ... known for its hard-edged investigative stories about government, politics and business, as well as its pointed, provocative coverage of sports, music and the arts." www.newtimes.com/profiles_dal.html.

[8] The article is attached as Appendix 6.

[9] References are to the Clerks Record in the State Court Proceeding. The entire record is not brought forward pending this Court's decision whether to grant the writ.

"News"[10] and stated that "[i]n the second homework-related arrest in as many weeks, A Denton County juvenile court judge [Whitten] jailed a Ponder student for suspicion of making a terroristic threat after the first-grader wrote a book report on the children's classic *Where the Wild Things Are."* The jailed student was described as "Cindy Bradley, a diminutive 6-year-old," brought before Whitten in "handcuffs, and ankle shackles." Whitten was reported to have ordered the child detained for ten days "while prosecutors contemplate whether to file charges." The article contained phony "quotes" from real people, including Petitioners, then Governor George W. Bush, the Superintendent of Schools, and a representative of the American Civil Liberties Union.[11] The story was a total fabrication. No such child exists, nor any similar child. There was no such event as depicted by the *Observer's* so-called "News" story. None of the persons quoted in the

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[10] The article was published at pages 11 and 13 of the November 11 - 17, 1999 issue of the Observer in a section of the paper labeled "News". The article is also indexed as "News," and was sandwiched between two legitimate news stories. Originally on the web site the article was labeled "News" but on or about November 18, 1999 it was relabeled "Satire" in an apparent reaction to the large number of readers who had believed the story to be true. However, as late as June 23, 2003 if one looks in the Observer's archives on its web site it will find the article "Stop the Madness" still labeled as "News." The article is attached as Appendix 6.

[11] The article quoted Whitten as stating from the bench:

> Any implication of violence in a school situation, even if it was just contained in a first grader's book report, is reason enough for panic and overreaction, ... It's time for you to grow up, young lady, and it's time for us to stop treating kids like children.

Isaacks was reported as stating "that he hasn't decided whether to prosecute Cindy," and quoted as saying "[w]e've considered having her certified to stand trial as an adult, but even in Texas there are some limits."

article ever spoke to Farley, the author, or any other person at the *Dallas Observer*. Nowhere in the subject article or elsewhere in the November 11 - 17, 1999 issue of the *Dallas Observer* is there is any disclaimer or warning that the story is intended as satire, parody or fiction.

The "Stop the madness" article was conceived and authored by Farley, a staff writer for the *Observer*, and it was published after input, editing, and approval by Williams, the *Dallas Observer's* managing editor, and Lyons, its editor-in-chief (CR 391-405). Respondents testified that the article was intended to be satire, but "written as if it were a 'straight news' story" (CR 392). To make the article believable, Defendants included a photograph of a six-year-old girl, purporting to be Cindy Bradley, but actually the daughter of an *Observer* staffer.[12] Immediately preceding the madness article was another hard news story "Return to Sender" about a Mexican man who was nearly deported due to INS ineptitude. Carefully juxtaposed immediately after the Madness article was a hard news article praising various *Dallas Observer* staff members, and especially the author Rose Farley for awards she had won as a serious and accomplished hard news journalist (CR 172). Farley had not previously published any works of satire or parody and her work for the *Observer* has been confined to hard news. (Deposition of Rose Farley, 42 CR 632,645).

Facts—the public reaction

Upon publication of the article, an overwhelming outcry arose from its readership in the nature of scorn, ridicule,

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[12] One need not be a journalist to recognize that column inches in a hard news story are carefully allotted by the editor. Photographs take up valuable space, but are used to lend credence to and draw attention to an article.

and criticism of Isaacks and Whitten. Many readers contacted the *Observer* through correspondence and electronic mail expressing their belief that the story was factual and criticizing the Plaintiffs.[13] Lyons "began receiving telephone calls and electronic mail messages from people who seemed to believe that the article's fictional account … was true" shortly after its publication. [Brief of Appellants, Court of Appeals, 8] This led Lyons to change the label above the story from "News" to "Satire" on the *Dallas Observer's* web site. [*Id.*]

In addition, Isaacks and Whitten and their respective staffs received the same type of public comment from readership of the article and from the news media in general which exhibited a general view that the "madness" article had been factual. On November 11th Judge Whitten's office was inundated with calls from citizens and members of the news media, who had seen the story, apparently believed it, and were calling for an explanation why the Judge had shackled and jailed a six year old child. Whitten continued to be sought by reporters for some time after the publication of the article, most of whom had taken the article to be a straight news story (CR 409-414[14]). Affidavit of Whitten, Appendix 7.

Isaacks received similar treatment. (CR 511, 522-526).[15] District Attorney Isaacks stated that he received

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[13] As one example a reader emailed the *Observer*:

> This is the responsibility of the parents. The judge in this case should be shackled for not seeing it this way and the prosecutor should be looking for criminals. Shame on all adults involved in this case!

[14] Redacted copies of the Whitten and Isaacks affidavits are attached as Appendices 7 & 8.

[15] Among the e-mails received by Isaacks was one which stated:

> "I read the article in the Dallas Observer about the arrest of six year old Cindy Bradley. You folks must all be smoking dope. Who in the hell is running our county. I want some people

calls from several major news agencies in the Dallas Metroplex. For 4 to 6 weeks after the article he was repeatedly questioned and sometimes accosted by citizens or strangers and well known acquaintances including attorneys who wanted to know why he would prosecute a 6 yr. old girl.[16] Isaacks received numerous expressions of concern, disappointment and outrage from various individuals in audiences when he gave speeches to civic and business groups. A great majority of the people who confronted him about the article believed it to be a true news story when they read it.[17]

Another irate citizen sent an e-mail to Wesley Shackleford, an attorney with the Texas Juvenile Probation Commission asking whether Judge Whitten could be removed from the bench.[18]

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fired. DA Bruce Isaacks fired if he presses charges. Judge Darlene Whitten should be removed from the bench for her commits [sic.]. I hope this little girls parents sues the county for every dime."

"I can't believe you guys are pulling this crap. You have people killing each other and shooting heroin in their eyelids and you guys are arresting six-year-olds. What in the world is going on? I read where you were thinking of trying her as an adult. I think Amnesty International should be called because the crap doesn't go on in third world countries."

[16] Under Texas law a child under the age of 10 cannot be prosecuted.

[17] Isaacks affidavit, Appendix 8.

[18] The e-mail stated in part:

"I have just read an article in the Dallas Observer about a six year old that was placed in the Denton County Juvenile Detention Center.... I am very troubled by the comments she [Judge Whitten] made from the bench.... This from someone who is going to have influence in creating law for juveniles in our State? ... I would really like a response to these questions. I am very scared for our children in Texas after what I have read." (CR 413, 418).

Judge Whitten received a voice mail from an individual identifying herself as an employee of Boeing Electronics. The voice mail stated that the caller and her colleagues at Boeing were outraged by the treatment of Cindy Bradley and would do everything in their power to defeat Judge Whitten at the next election. (CR 411).

Facts—Media Reaction

Public reaction to the *Dallas Observer* story was exacerbated because other members of the media believed the story to be a factual account of a real juvenile court proceeding. Perhaps the most damaging of these was a report on the popular KRLD 1080 radio program the "Charlie Jones Show". Jones originally reported the item as hard news and read significant excerpts from the article. Amy Iverson, producer of the Charley Jones Show called wanting comment on the story from Judge Whitten. (CR 410-411; Deposition of Charley Jones at 20-21; 24-30; 98-100; CR741). Jones testified, "My impression was that it [the madness article] was real." Jones expressed this belief to his radio audience many of whom were misled.[19] Substantial evidence that the "average reader of ordinary intelligence" not only could be, but was in fact confused is established by the flood of emails, angry phone calls, and an article in the newspaper of a major state school calling for the removal of Isaacks and Whitten from office. A newspaper article was published in the *North Texas Daily* of the University of North Texas on November 27, 1999, and posted on its web site. The *Daily* said the Petitioners were "too incompetent to serve the populace" and called for

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[19] Excerpts from Jones deposition and his radio broadcast are set out in Appendix 9.

their dismissal from office, based upon their conduct as described in the *Dallas Observer* article (CR 174).

Judge Whitten received a call from Steve Stoller of the Dallas Fox 4 News television who told her that there was a news story in the *Dallas Observer* stating that the Judge had incarcerated a six-year-old girl. From Stoller's demeanor and the tone of his voice Judge Whitten believed him to be seriously inquiring about what he believed to be an actual news story. Judge Whitten received similar calls from other reporters from major media outlets who took the *Observer* story seriously. Whitten Affidavit, Appendix 7. Adding insult to injury the *Observer* defended its action as a satire of an earlier incident that was inaccurately reported.[20]

After Plaintiffs demanded a retraction of the November 11 publication, the *Dallas Observer* published another article, authored by Williams, which refused an apology, but which admitted that the story was not real, that "[w]e made it up" (CR 178) and admitting that "Stop the madness" was published "in a space normally reserved for straight-up news stories." The statements were admittedly manufactured from whole cloth and made with knowledge of their falsity.

Errors by Texas Supreme Court

The First Amendment to the United States Constitution protects freedom of speech and of the press and its values are mirrored by the Texas Constitution. TEX. CONST. art. I, §§ 8 & 13. See Appendix 5.

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[20] The Chris Beamon incident was inaccurately reported by the Dallas Morning News and other traditional media. Judge Whitten was forbidden by Canons of Judicial Ethics and privacy laws protecting Juvenile offenders from commenting at the time. The only competent evidence of that incident is set forth in her Affidavit, Appendix 7.

The Texas Supreme Court[21] erred by failing to use the test for actual malice set out by this Court in *New York Times v. Sullivan,* and substituting its own test for actual malice in cases involving satire. The test adopted by the court below goes beyond determining whether the publisher knew that statements of fact it made were false when published, or acted in reckless disregard of whether they were true or not. *New York Times v. Sullivan.*[22] The court below held that the inquiry in satire cases required the court to determine whether the publisher knew or acted in reckless disregard for whether the article could reasonably be interpreted as stating actual facts.[23] Thus the court below focused on the foreknowledge of the publisher that the article would not be recognized as a satire, or the publishers' recklessness in failing to recognize that the article would be taken as true. This holding went beyond any teachings of this Court, and effectively immunizes media defendants from liability in public official libel actions. If a different standard for proof of actual malice is to be devised in satire and parody cases, it should be done by this Court, and it should not be the test adopted by the court below.

The court below looked at the publisher's subjective intent, which is highly relevant in applying the *Sullivan* actual malice test in the context of hard news, but is irrelevant in satire cases. The proper standard is an objective one, applied from the standpoint of a reasonable reader of average intelligence. The subjective belief of the reporter *is* relevant in straight news reporting when it pertains to the reporter's good faith belief that what he has

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[21] Appendix 1.

[22] 376 U.S. at 279-80; accord *Huckabee v. Time Warner Entm't Co.,* 19 S.W.3d 413 (Tex.2000).

[23] New Times v. Isaacks, 146 S.W.3d 144, 163 (Tex.2004); Appendix 1.

published is, in fact, true. For example, a reporter who receives information from a reliable source that a public official has taken a bribe and publishes that information in the good faith belief that it is true cannot be held accountable in a defamation action if the information turns out to be erroneous. If the reporter has acted in the belief that the information is true, and has not been reckless in publishing it, he is immune under the *New York Times v. Sullivan* standard.

In the satire context, the reporter's subjective belief is irrelevant, because he always knows that what he is publishing is not true. The issue is whether the article could be believed to be true by a reasonable reader of average intelligence, and this will almost always be a question of fact for the jury. Unless this objective standard is applied, a reporter's assertion that "I never thought anyone would believe it," will always be an unassailable defense, no matter how believable the stated facts and how false the phony quotations and no matter if one hundred percent of the readers in fact believe the article to be true.

The Texas Supreme Court also erred in its interpretation and application of this Court's opinion in *Hustler Magazine v. Falwell,*[24] stating that this Court "implicitly rejected a literal application of the actual malice rule to works involving satire or parody."[25] Petitioners believe otherwise. In misapplying the *Falwell* line of cases the court below effectively foreclosed any successful defamation claim by a public figure against a media defendant who claims his work was a satire.

The Texas Supreme Court correctly set out the standards for determining whether an article can be taken by the reasonable reader of average intelligence as a report of actual events, but improperly decided the question as a

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[24] Supra.

[25] New Times v. Isaacks, 146 S.W.3d at 163; Appendix 1 at 43.

matter of law, when a jury question is clearly presented under case law of the United States Supreme Court. In this connection the court below improperly concluded that evidence that a large number of readers, including the highly educated, believed the madness article to be a report of actual events is not competent evidence to raise a fact issue. The court compounded this error by disregarding well established law that evidence of a publisher's common law malice is competent circumstantial evidence to prove constitutional actual malice.

Finally, the Texas Supreme Court erred in equating the conduct of the reasonable reader of average intelligence with the hypothetical "reasonable man" of negligence law. This, in effect affords media defendants with a new defense: The negligence of a reader who owes no tort law duty, is now a defense to the media defendant's knowing publication of falsehoods.

Defamation Per Se

It is defamatory *per se* to publish an untrue statement about a public official, which, if true, would subject him to removal from office. *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d. 499, 505 (Tex. 1950).[26] Without a doubt, Isaacks and Whitten would have been subject to removal from their respective offices, had they engaged in the unlawful and reprehensible conduct falsely attributed to them in the "Stop the Madness" publication.

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[26] A district attorney in Texas is subject removal from office for "incompetency" [sic] or "official misconduct." TEX. LOC. GOV'T CODE ANN., § 87.013 (Vernon 1988). A judge of a legislatively created court could be removed from office for, incompetence, violation of the Code of Judicial Conduct, conduct that casts public discredit on the judiciary, or violation of the penal code. See Appendix 5

Satire and Parody

Respondents maintain that the article is a protected opinion in the form of satire. Publication of an opinion, including satire or parody, will give rise to an action for libel, if the statement of opinion falsely asserts or implies objective facts, and the publication can be understood by a reasonable reader of average intelligence as intended to convey actual facts.

Considering this issue in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), the United States Supreme Court specifically declined to "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" In *Milkovich,* Chief Justice Rehnquist, writing for the Court, recognized that language in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) had been misinterpreted, and that the *Gertz* language was mere *dictum* which reiterated the "classic 'marketplace of ideas' concept" discussed by Justice Holmes in *Abrams v. United States,* 250 U.S. 616, 630 (1919). Recognizing the flaw in equating the term "opinion" with the term "idea" this Court stated that "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich, supra,* at 18.

The Court refused to recognize a constitutional privilege for statements of "opinion," holding that the interests in question are adequately protected by other existing doctrines.[27] Principal among these is the "actual

[27] These include the requirements that the plaintiff (1) prove falsity, as well as fault, abrogating any common law presumption in media cases that defamatory speech is false. *Philadelphia Newspapers, Inc., v. Hepps,* 475 U.S. 767, 777-78 (1986); (2) statements of opinion that cannot be "reasonably interpreted as stating actual facts" are protected under the First Amendment. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50 (1988); *Letter Carriers v. Austin,* 418 U.S. 264, 284-86 (1974); *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler,* 398 U.S. 6, 13-14 (1970) Statements are protected if the amount to nothing

malice" standard developed in *New York Times Co. v. Sullivan.* [28]

Analysis under *Milkovich* and Its Progeny

A fundamental issue in this case is the *Observer*'s assertion that the offending article was mere satire and parody, amounting to "imaginative expression" and "rhetorical hyperbole" that could not "reasonably be interpreted as stating actual facts" which bring it into the realm of non-actionable pure opinion under the rule of *Hustler Magazine v. Falwell, supra.* A detailed analysis of the facts and law is prohibited by the constraints of this petition, but a few principles demonstrate the approach which a court must take. The inquiry is whether a reasonable finder of fact could conclude that the statement in question implies an assertion of objective fact. One approach has been to inquire whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; whether the defendant used figurative or hyperbolic language that negates that impression; and whether the statement in question is susceptible of being proved true or false. *Partington v. Bugliosi.*[29] A similar approach is to examine the format of

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more than "rhetorical hyperbole" which could not reasonably be understood as describing actual facts about the plaintiffs or actual events in which they participated; (3) an appellate court must make an independent examination of the entire trial record to assure that a judgment does not constitute an improper intrusion upon free expression, and the issue of the sufficiency of the evidence to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685 (1989).

[28] 376 U.S. at 279-80, i.e., "knowledge of the falsity or reckless disregard for the truth;"

[29] 56 F.3d 1147, 1153 (9th Cir. 1995).

the publication, its structure, its tone, and its breadth. *Phantom Touring, Inc. v. Affiliated Publications.*[30]

These cases simply stand for the proposition that the article must be taken in context for determining the expectations that should arise in the reasonable reader of average intelligence.[31]

The article in question was indexed and published under the heading as "News", in a section of the publication normally reserved for hard news stories, in a newsweekly devoted to hard-hitting investigative journalism, sandwiched between two hard news items, by an award-winning author of feature articles. There is nothing about the context, tenor, or format to warn the reasonable reader to expect opinion.

The context of the *Observer* article is consistent with factual reporting of the news. It is presented as a factual account of actual events, and in typical fashion it includes quotes from the parties involved. This Court has written at length about the potential harm of fabricated quotations that amount to defamation. *Masson v. New Yorker Magazine.* [32] Recognizing that "quotations may be a devastating instrument for conveying false meaning," the Court held in *Masson* that a fictitious quote equates with knowledge of its falsity, *i.e.,* constitutional actual malice, unless it is an immaterial alteration of a statement actually made. *Id.* at 517. [33]

The "Stop the Madness" article published by the *Dallas Observer* is simply not of such outrageous nature as

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[30] 953 F.2d 724 (1st Cir.), *cert. denied,* 504 U.S. 974 (1992).

[31] *See also, Moldea v. New York Times Co.,* 22 F.3d 310, 313 (D.C. Cir. 1994) (court struck libel claim in part because statements "were evaluations of literary work which appeared in a forum in which readers expect to find such evaluations").

[32] 501 U.S. 496, 511-12 (1991).

[33] Accord, *Carson v. Allied News Company,* 529 F.2d 206, 213 (7th Cir. 1976).

to readily convince the reasonable reader that it is purely an expression of opinion. This fact is driven home by the overwhelming response of those readers who believed the article. The article does not disclose non-defamatory facts upon which an opinion is based, it does not present mixed information, and it does not invite the reader to draw other conclusions. It simply presents conclusions that the described events occurred, impliedly based upon facts to which the author was privy.

All the statements in the article are provably false, and therefore verifiable.[34] The *Observer* article is replete from beginning to end with assertions of fact that are provably, and admittedly, "made-up" and "fictional." If the statements in question were vague and indefinite and constituted evaluative opinion, how could the Respondents admit that they were fictional? This point was well made by the Seventh Circuit: "While an opinion can be right or wrong, it cannot be true or false." *Brown & Williamson Tobacco Corp. v. Jacobson.* [35]

Actual Malice

"Actual malice" is present when a defamatory statement is made "with knowledge that it was false or with reckless disregard of whether it was true or not."[36] Actual malice can be proven through circumstantial evidence, and it is by no means necessary for a defamation plaintiff to secure an admission from the publisher of his subjective

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[34] Among those facts described in the publication that are easily provable as true or false are: whether the court proceeding occurred at all, whether Whitten indeed jailed 6-year-old Cindy Bradley, whether Isaacks actually contemplated her prosecution, and whether Isaacks and Whitten made the statements attributed to them. These facts are deductive, not evaluative.

[35] 827 F.2d 1119, 1131 (7th Cir. 1987).

[36] *New York Times Co., supra,* at 279-80.

guilt.[37] Clearly, objective evidence of the circumstances surrounding the publication from which actual malice might be inferred is sufficient. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000).

Respondents and the Texas Supreme Court wish to rewrite almost 40 years of *New York Times* law to establish an exception to the actual malice rule for cases involving fiction, satire, or parody. Quite simply, this rule would be that, if an author did not subjectively intend for his publication to be believed, there could be no finding of actual malice. This is the source of the Texas Supreme Court's erroneous conclusion that this Court in *Hustler Magazine v. Falwell* "implicitly rejected" the literal application of the *New York Times* actual malice test in satire cases. Under *Sullivan* and *Falwell*, however, if a satire or parody is perceived by a reasonable reader of average intelligence to convey actual facts, actual malice is present, whether or not the author subjectively intended to deceive the reader. Similarly, if such publication is made with reckless disregard of whether a reasonable reader could believe the article to state actual facts, the constitutional actual malice test is met. The holding of the court below that *Falwell* implicitly rejected the literal interpretation of *Sullivan* should not be permitted to stand.

Respondents relied on *Hoppe v. Hearst Corp.*[38] which espouses a different test for actual malice in the area of "satire, humor, or fiction."[39] That test is "whether the author intended, or recklessly failed to anticipate, that readers would construe the publication as a statement of defamatory facts." *Hoppe* has not been widely accepted nor followed by other courts and has certainly been neither

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[37] *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 667-* 668; *Herbert v. Lando,* 441 U.S. 153, 160 (1979).

[38] 53 Wash. App. 668, 770 P.2d 203 (Wash. Ct. App. 1989).

[39] *Id.*, at 208.

approved nor endorsed by the United States Supreme Court. It is not the law of the land. Furthermore, even if *Hoppe* applied to the case at bar, it would weigh directly in Petitioners' favor, because the summary judgment evidence in this case certainly raises a genuine issue of material fact as to whether the Respondents "recklessly failed to anticipate" that their article would be taken as true. Of course, the *Observer* disavows this element of the *Hoppe* test and claims that the Washington court was in error in going this far.

The reliance by the court below upon *Dworkin v. Hustler Magazine, Inc.*[40] is wholly misplaced. The *Dworkin* court theorized in *dicta* that since one who intends a satire intends it to be recognized as such "there is no consciousness that [the publisher] is publishing something false, because [the publisher doesn't] think [he's] publishing a statement of fact."[41] The quoted language is not a rule of law, nor does it establish a different standard of actual malice in cases such as the case at bar. But, assuming *arguendo*, that it bears some precedential value, it should take no more than a moment to conclude that it does not apply to this case. The hypothetical case discussed in *Dworkin* is one in which "the [publications] contain no statements of fact." An assertion that Judge Darlene Whitten (a real judge sitting in a real court) and Criminal District Attorney Isaacks (a real district attorney) jailed 6-year-old Cindy Bradley is a false, defamatory statement of fact.

Hustler Magazine v. Falwell

It is telling to compare the style and format of the publication in this case to that which was at issue in *Hustler Magazine v. Falwell, supra*. There the Court applied the

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[40] 867 F.2d 1188 (9th Cir. 1989).

[41] *Id.*, at 1193-94 (citations omitted).

New York Times standard to Falwell's claim of intentional infliction of emotional distress, holding that state law standards of intentional infliction of emotional distress would not satisfy the *New York Times* standard. The Court held that Falwell, to prevail, must prove that Hustler had knowingly published defamatory falsehoods, or that it had published such falsehoods with reckless disregard as to their truth. *Id.*, at 56.[42]

In the present case the *Observer,* unlike Hustler did nothing to directly inform the reader that the story was a fictional parody. It contained no heading or disclaimer to so inform the reader. For the reasons discussed the madness article by its context was not an obvious satire. The article did not follow the format of a well-known ad campaign or other format that would have led the reader to the conclusion that it was a satire. In *Falwell* a jury had found that the phony ad parody could not have been taken by the average reader as a statement of actual events. In the present case the court below has misapplied both *Sullivan* and *Falwell* and usurped the function of the jury.

If *Sullivan* as followed in *Falwell* states the applicable law, then the *Dallas Observer's* arguments are without merit. The *Falwell* Court noted that the jury had found against Falwell on his libel claims because the *Hustler* parody was published in such a manner that no reasonable reader could have believed it to be a depiction of actual events. The Court's language clearly indicates its

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[42] The facts in *Falwell* differ from the present case. In *Falwell* the publisher of *Hustler* had gone to some lengths to inform the reader that the "advertisement" which held Falwell up to ridicule was, in fact, not a depiction of actual events, but a parody. The phony ad was based upon a well known series of ads for Campari Liqueur, in which various celebrities spoke of their "first time" to drink the product. In small print at the bottom of the page, the ad contained a disclaimer, "ad parody -- not to be taken seriously." The magazine's table of contents also listed the ad as "Fiction; Ad and Personality Parody." *Id.* at 48.

belief that this is a question of fact for the jury under traditional standards of libel law.

QUERY: If the *Falwell* parody had not contained the prominent and unequivocal disclaimers; had been indexed and published as a "news" article; had been carried in a publication noted for aggressive investigative journalism rather than a magazine infamous for similar outrageous parodies and the ravings of its equally outrageous publisher; had been written by an award winning investigative journalist; had been sandwiched between two serious articles; had been met with outrage by large numbers of readers who thought it depicted actual events; and had contained phony photographs of a young Jerry Falwell and his mother, **can it be said as a matter of law that a reasonable jury could not have concluded that an ordinary reader of average intelligence could have reasonably believed the article to be a depiction of facts?** If a reasonable jury could so conclude, then the Supreme Court decision in *Falwell* leaves little doubt that a jury in the present case could so find, and the Texas Supreme Court erred in holding to the contrary.[43]

The "reasonable man"

The Supreme Court of Texas erred by equating the hypothetical "reasonable man" of the negligence case with the "average reader of ordinary intelligence" discussed in *Hustler Magazine v. Falwell.*[44] These are two distinct legal characters, created by the courts for two distinct functions. This court below erred in adopting the reasoning of *Patrick*

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[43] Petitioners are aware that this Court rarely reviews erroneous application of settled law and the fact findings of state courts. In this case the erroneous fact findings result from the Texas Supreme Court's application of its own departure from *Sullivan* and *Falwell.*

[44] 485 U.S. 46 (1988).

v. Superior Court[45] to effectively predetermine all future satire defamation cases adversely to all public officials and public figures.

The hypothetical "reasonable man" is a judicially created fiction whose function is to measure objectively the reasonableness of the conduct of an allegedly **negligent actor who owes a duty of "ordinary care under the same or similar circumstances" to another injured in his person or property by the actors conduct.**[46] [47] The court below focused on the alleged shortcomings of readers who have no tort duty whatsoever, and glossed over the conduct of Respondents who have specific and well defined duties to avoid making false, defamatory statements of fact about others.

The opinion below adopts the allegedly negligent conduct of readers as a defense to Respondents' actionable conduct. This improperly focuses on the reader, not the

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[45] 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994).

[46] The fictitious reasonable man is the standard to measure an actor accused of negligence, **and therefore presupposed to owe a duty to his injured victim.** This paragon "is required to do what such an **ideal individual** would be supposed to do in [the defendant's] place....He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person who is always up to standard....[He] is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment. PROSSER & KEETON ON TORTS, §32 (5th ed., West, 1984, Lawyer's Ed.) (hereafter PROSSER & KEETON).

[47] The reasonable man standard of negligence law is to provide the court and jury with an **ideal person** to determine "whether the [actor's] harm-causing conduct was too risky. Apart from the risk of harm to others, courts are not interested in whether the [actor] was unreasonable." 1 DOBBS, THE LAW OF TORTS § 117 (West 2001) (hereafter DOBBS).

publisher and poses some very interesting questions which cannot be covered in this page-restricted motion.[48]

The Texas Supreme Court's erroneous adoption of negligence law's "reasonable man" is refuted by its own analysis. The court below stated the proposition that the more subtle the satire, the greater the chance of misunderstanding.[49] *Precisely!!* But since the "reasonable man" never fails to "get the joke" no satire, good or poor, will be a basis for defamation.[50] Any person, no matter how educated and street wise who understands the article as a report of actual events has by definition of the court below failed to use ordinary care in reading and evaluating the publication. Taken to its logical conclusion, one hundred percent of the 200,000 *Observer* readers could believe "Stop the Madness" to be a report of true events, but the court below would conclude, as did *Buzz* that they are "clueless."[51] To hold that the testimony of these otherwise normal, reasonable adults is, as a matter of law, incompetent to raise a fact issue is even stranger than the

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[48] For example, to whom did the readers of "Stop the Madness" owe a duty of ordinary care?

[49] Quoting BRUCE W. SANFORD, LIBEL & PRIVACY 193-94 (2d ed. 1991).

[50] The Texas Supreme Court's action in forcing the "square peg" of the "reasonable man," into the "round hole" of the "average reader of ordinary intelligence" is a formula for mischief, because it means that any purported satire will always be sniffed out and recognized by the "reasonable man," no matter how false and defamatory the stated facts, and no matter how subtle the clues.

[51] A scientific survey of readers of ordinary intelligence that showed that 25, 50, 75 or even 100 percent of readers believed the story would be irrelevant. Petitioners intended to make a showing at trial to the effect that the story was assigned to a group of journalism graduate students who were unaware of the controversy. Only a minority recognized the story as a satire. This too is irrelevant under the opinion below. So much for the principle that a non-movant need not marshal all his evidence to defeat a summary judgment.

Observer's decision to satirize an event that never happened.

The real question is whether a "reasonablereader of average intelligence" could read the article and believe it to be true. The court below supplied its own interpretation of material evidentiary "clues" to the fictional nature of the article, and concluded as a matter of law that the article could not be reasonably understood as stating actual facts about Isaacks and Whitten. While the "reasonable minds" in the trial court and court of appeals had no trouble in stating the applicable law, they ceased to be "reasonable minds" when they came to the opposite conclusion about the impact of article on the "reasonable man."

One reason for this difference of opinion is that the trial court and court of appeals placed themselves in the shoes of the reader; the Texas Supreme Court did not. All the judges who have reviewed this case knew that the article was not a depiction of actual events; the Supreme Court of Texas, however, did not view the article in the eyes of a reader who had no foreknowledge that it was an attempt at satire; rather it indulged every presumption in favor of the "reasonable man" having the same foreknowledge. When "Stop the Madness" was published, only the Petitioners and Respondents knew it was not true. The "reasonable reader of average intelligence" picked the paper up from the newsstand expecting news.[52] Both "careful readers" and "skimmers" concluded that the article depicted actual events. These were newspaper readers, not Supreme Court Justices with the benefit of foreknowledge. The *Observer* claims to be a weekly "alternative" paper reporting in

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[52]He read it on his commute, or while eating breakfast or lunch, or on his morning break, or in stages between phone calls at work or home. It was not a homework assignment or a document upon which he would reasonably expect to be examined. He did not owe any tort law duty. Some read the entire article, others the highlights.

greater depth than the daily competition. Thus the testimony of Julie Lyons relied on by the court below as evidence that the reader could expect to find a satire says just the opposite. The *Observer* has in effect said, "when you read our paper you will get the real, behind the scenes truth." When a story is "made-up" it is all the more likely to be believed by the "average *Observer* reader of ordinary intelligence" because he looks to the *Observer* for truth.[53] One might inquire how the court below can use examples of readers who were fooled into belief that a satire was true to show that reasonable people are sometimes fooled and therefore acted unreasonably under the circumstances, while at the same time holding that a plaintiff who produces readers who were fooled as evidence that the article could be taken as true has not produced summary judgment evidence raising a question of fact. The *Observer's* very market niche and self promotion as the place to find the "truth" ignored by the establishment press makes it more likely, not less, that the "reasonable reader" would take the article in question as true.

Evidence of custom and practice are relevant to determine whether the actor's conduct meets the legal standard.[54] Courts frequently adopt customary community behavior as indicative of how a reasonable person would

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[53] The court below uses examples of intelligent readers being fooled as proof that readers of the *Observer* should not have been surprised to find a satire sandwiched between two hard news stories in a section of the paper labeled and indexed as "news." The examples prove the opposite. Deborah Norville being fooled by a story in *The Onion* is only proof that she was not familiar with that publication which is an on line publication devoted exclusively to Satire and Parody. Anyone familiar with that publication would be shocked to find a serious article. Similarly a reporter in China unfamiliar with American journalism and American culture might be expected to misunderstand a published satire that the average American reader would immediately grasp.

[54] See generally PROSSER & KEETON § 33; DOBBS §§ 117, 122.

behave.[55] The court below adopted the "reasonable man" standard but failed to educate the bench and bar as to how this fellow ordinarily acts. It seems to Petitioners that the court below has gone too far by holding reasonable readers to the standard of perfection demanded in the negligence context. The court below cites only a copyright infringement case for its rejection of the proposition that some who might be denominated reasonable readers will form opinions before completing the entire article.[56] Custom and practice go to the very heart of whether particular conduct is reasonable under the circumstances. A reader cannot be charged with assuming that a story appearing in the news section of the paper is not what it appears to be on the surface;[57] nor with assuming that real public officials, to whom quotes are attributed, did not

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[55] DOBBS § 117 at 279; PROSSER & KEETON § 33 at 193-94.

[56] The court cites *Campbell v. Acuff-Rose Misic, Inc.*, 510 U.S. 569, 583 (1994); this case does not speak to the question of what conduct is expected of a reasonable reader in a defamation case.

[57] The court relies upon anecdotal evidence that persons have mistakenly taken satire for fact before as evidence that the fact that some persons were misled not being evidence of the conduct of the reasonable man. This argument misses the point. In none of the instances cited were the rights of individuals to their well-earned reputations at stake. Moreover, the evidence declared insufficient in *San Francisco Bay Guardian v. Superior Court*, 21 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1993) was reviewed under the more stringent "clear and convincing evidence" standard. Petitioners in this case operated in good faith under the tradition Texas summary judgment standards. Under Texas law the plaintiff need only raise the favorable evidence at the summary judgment stage, but must meet the clear and convincing evidence standard at trial on the merits. *Huckabee v. Time Warner, supra* at note 22. The many persons of more than average intelligence and savvy who were fooled by the article are circumstantial evidence that the article was false and defamatory. At trial Petitioners intended to go into great depth with as many of these individuals as possible to determine the circumstances of their reading the article, all or part, and the conclusions they reached.

make the statements; nor with assuming that the picture of Cindy is not really Cindy, and that Cindy does not really exist; nor with knowledge that GOOF is not a real crackpot organization that one runs into ever more frequently in modern times; nor with knowing that the real ACLU official "quoted" did not make the statement; nor with knowing that the School Superintendent and the Governor did not make the "no tolerance" statements attributed to them. Every parent of a child in public school has read actual accounts of the "no tolerance" policies now in vogue. The story may very well have been believed by the "reasonable man" without deviation from the standard of care required by society.

The use of the reasonable man of negligence law as identical to the average reader of ordinary intelligence, is the wrong tool for the wrong purpose.

The "average reader of ordinary intelligence" of defamation law is not negligence law's "reasonable man." His purpose is to restrict the responsibility of the press to a real world standard. In *Hustler Magazine, Inc. v. Falwell*[58], the court made abundantly clear that in cases of satire the standard of *New York Times Co. v. Sullivan*[59] was applicable. The court below relied on *Greenbelt*[60] line of cases for the proposition that the Observer article was hyperbole that no reasonable person could take literally. But each of the cases relied upon by this court were distinguished by the court of appeals and by Petitioners. The *Falwell* court, the court of appeals below, and the case law all recognize that the inquiry is extremely fact specific, and is best left to a jury.

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[58] 485 U.S. 46 (1988).

[59] 376 U.S. 254 (1964).

[60] *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970)

The story was written with the express purpose of holding Whitten and Isaacks up to ridicule. The court below opined that *Falwell* forecloses the use of evidence of common law malice as evidentiary of constitutional malice. The case does not so hold. It has been held that a media defendant's negligent conduct may be taken as evidence of the defendant's inner awareness of probable falsity. If he publishes wholly unverified facts the jury may be permitted to conclude that he in fact knew or had serious doubts about his story's truth.[61] Similarly, post *Falwell* case law demonstrates the publisher's spite and ill-will may be admissible to buttress evidence of knowing falsehood by showing a motive to lie. *Celle v. Filipino Reporter Enters, Inc.*[62] Under *Milkovitch*,[63] the statements of fact are provably false, and thus not opinion. All the principals in publishing the story testified that they knew it was not true when published. This alone is enough evidence of constitutional malice to raise a fact issue and have a trial.

REASONS FOR GRANTING THE WRIT

This is a First Amendment public official libel case of first impression. This Court has never squarely faced and decided the applicable standards governing how to determine if an alleged satire is actionable. This court has not spoken directly to the question of how the *New York Times v. Sullivan* actual malice standard is to be applied in a case of alleged satire. This court has not determined whether, as Respondents contend, the publisher of a satire is protected if he did not intend his work to be taken as a depiction of actual fact, or whether the focus must be on the reaction of the reasonable reader of average intelligence to the article.

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[61] St. Amant v. Thompson, 390 U.S. 727 (1968).
[62] 209 F.3d 163 (2d Cir. 2000).
[63] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)

If the standard promulgated by the media and the court below is the law of the land, there is no basis for a public official to sue a media defendant who claims to have written a satire.

The court below also erroneously attributed to *Falwell* an implicit rejection of *Sullivan.* Although *Falwell* concerned a parody, a jury had determined that no reasonable reader could have taken it as a report of actual events. Thus the Court in Falwell did not squarely face the issues presented here.

The Supreme Court of Texas has pronounced a rule that goes far beyond the language of *Sullivan* in considering the actual malice question. That court has also held that *Falwell* implicitly held that the Sullivan standard may not be literally applied in a case of purported satire, the only court of last resort to so hold insofar as Petitioners are aware.

That court has further held that under no circumstances are the actual reactions of purported reasonable readers competent to raise a fact issue.

That Court has further opined contrary to established case law that common law actual malice may not be used as circumstantial evidence of constitutional actual malice, even when coupled with a defendant's admission that he knew the article was untrue when it was published.

Finally, the Supreme Court of Texas has totally misconstrued the nature of the reasonable reader of ordinary intelligence and improperly equated him with the reasonable man of negligence law. In effect the court below has said that even though a reader has no tort duty, his failure to recognize all the clues that a particular article is satire, no matter how subtle, renders him a "negligent reader" and provides a defense to the publisher. The court

compounds this problem by holding the reader of a newspaper article to the careful standard that might apply to a professional reading a text, treatise, or technical journal in connection with a duty to a client or employer. Rather, the law should be that the standard is to be judged by the customary conduct of the average newspaper reader, who looks at the paper on his commute, over his morning coffee, or in disjoined moments between the other tasks of daily life.

This case has importance to the media, to public officials, and to the bar. More importantly it is important for this Court, in the exercise of its duties as the final arbiter of our Constitution, to elucidate the standards by which we are to be governed in cases of this nature.

CONCLUSION

This Court should grant this petition for writ of certiorari and after briefing on the merits and argument reverse the decision of the Texas Supreme Court and remand this case for trial on the merits.

Respectfully submitted,

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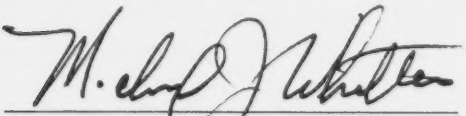

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(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

BRUCE ISAACKS and DARLENE A. WHITTEN,
Petitioners

v.

NEW TIMES, INC., d/b/a DALLAS OBSERVER, DALLAS OBSERVER, L.P., ROSE FARLEY, JULIE LYONS, and PATRICK WILLIAMS,

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Texas

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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February 3, 2005

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APPENDIX NO. 1

Supreme Court of Texas.

NEW TIMES, INC. d/b/a Dallas Observer, Dallas Observer, L.P., Rose Farley, Julie Lyons, and Patrick Williams, Petitioners,

v.

Bruce **ISAACKS** and Darlene A. **Whitten,** Respondents.

No. 03-0019.

Argued Dec. 3, 2003.

Decided Sept. 3, 2004.

Rehearing Denied Nov. 5, 2004.

Background: District attorney and judge brought suit against newspaper and its staff for libel based publication of satirical article. The 158th District Court, Denton County, Bob McCoy, J., denied newspaper's motions for summary judgment, and the Court of Appeals, 91 S.W.3d 844, affirmed.

Holdings: On newspaper's petition for review, the Supreme Court, Wallace B. Jefferson, J., held that:
(1) satirical article in which fictional statements were attributed to attorney and judge constituted protected speech, and
(2) fictional statements attributed to attorney and judge were not motivated by actual malice.

Reversed and rendered.

West Headnotes

[1] KeyCite Notes

⇦92 Constitutional Law

92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports.
Most Cited Cases

Where the parties in a libel action have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, the Supreme Court limits its analysis to the First Amendment and simply assumes that its concerns are congruent with those of the state constitutional right of free speech. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) k. In General. Most Cited Cases

Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations

92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Falsity, for First Amendment purposes, depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

237 Libel and Slander
237IV Actions
237IV(E) Trial, Judgment, and Review
237k123 Questions for Jury
237k123(2) k. Construction of Defamatory Language in General. Most Cited Cases

Whether a publication is capable of a defamatory meaning is initially a question for the court, but when a publication is of ambiguous or doubtful import, the jury must determine its meaning.

[5] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

The test for determining whether a satirical publication is protected speech, in the context of an action for libel, is whether the publication could be reasonably understood as

describing actual facts. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

The hypothetical reasonable person, for the purposes of determining whether a false publication is defamatory, does not represent the lowest common denominator, but is of reasonable intelligence and learning; he or she can tell the difference between satire and sincerity.

[7] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

The appropriate inquiry in determining whether a reasonable reader would understand that the publication does not state an actual fact, for the purposes of libel, is objective, not subjective, and thus, the question is not whether some actual readers were misled by the publication, as they inevitably will be, but whether the hypothetical reasonable reader could be.

[8] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

In a libel case involving parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them.

[9] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

237 Libel and Slander KeyCite Notes
237I Words and Acts Actionable, and Liability Therefor
237k10 Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment
237k10(4) k. Judicial Officers. Most Cited Cases

Satirical article entitled "Stop the madness" about six-year-old child placed in ankle shackles for spraying boy with juice and sitting on her feet, in which district attorney was

quoted as saying that "we're considering having her certified to stand trial as an adult," and in which judge was attributed to statement that "any implication of violence in school is reason enough for panic and overreaction," constituted protected speech and thus, did not state claim for libel against newspaper; as whole, statements involved exaggeration, and reasonable reader would understand that article did not purport to state actual fact, but merely was intended as critical comment on actual event in which seven-year-old boy was arrested for writing story about shooting teacher and students in response to school assignment to write scary story. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

⇨237 Libel and Slander
⇨237I Words and Acts Actionable, and Liability Therefor
⇨237k19 k. Construction of Language Used. Most Cited Cases

A court cannot impose civil liability for libel based on the subjective interpretation of a reader who has formed an opinion about the article's veracity after reading a sentence or two out of context; that person is not an "objectively reasonable reader," for the purposes of determining whether a satirical publication is defamatory.

[11] KeyCite Notes

⇨237 Libel and Slander
⇨237I Words and Acts Actionable, and Liability Therefor

237k19 k. Construction of Language Used. Most Cited Cases

The presence of a disclaimer with respect to a satirical publication is not dispositive on the issue of whether a reasonable reader would understand that the publication states an actual fact, for the purposes of an action for libel, but is one of many signals the reasonable reader may consider in evaluating the publication.

[12] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

Fictional, satirical article entitled "Stop the madness" about six-year-old child placed in ankle shackles for spraying boy with juice and sitting on her feet, in which district attorney was quoted as saying that "we're considering having her certified to stand trial as an adult," and in which judge was attributed to statement that "any implication of violence in school is reason enough for panic and overreaction," was not motivated by "actual malice," as required for attorney and judge to recover for libel, in action against newspaper, in view of testimony by writer and editors that purpose of article was to merely parody actual incident in which young boy was arrested for writing story about shooting teacher and students in response to assignment to write scary story, that article was written in manner that reader would clearly understand it to be fiction, and that they never intended that article be

understood by reader as account of actual events, and newspaper clarified its intent by subsequently publishing article that offending article was a joke. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

[13] KeyCite Notes

⇐237 Libel and Slander
⇐237II Privileged Communications, and Malice Therein
⇐237k48 Criticism and Comment on Public Matters; Public Figures
⇐237k48(1) k. In General. Most Cited Cases

Public figures cannot recover for defamatory statements made about them absent proof of actual malice.

[14] KeyCite Notes

⇐237 Libel and Slander
⇐237II Privileged Communications, and Malice Therein
⇐237k51 Existence and Effect of Malice
⇐237k51(1) k. In General. Most Cited Cases

"Actual malice," in the context of a libel action, requires proof that the defendant made a statement with knowledge that it was false or with reckless disregard of whether it was true or not.

[15] KeyCite Notes

⇐237 Libel and Slander
⇐237II Privileged Communications, and Malice Therein

237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

Reckless disregard for the truth, in the context of a libel action, is a subjective standard, focusing on the defendant's state of mind.

[16] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

Mere negligence in making a false statement is not enough to show actual malice, in the context of a libel action; rather, the plaintiff must establish that the defendant in fact entertained serious doubts as to the truth of his publication, or had a high degree of awareness of the probable falsity of the published information.

[17] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

Constitutional malice, for the purposes of libel, generally consists of calculated falsehood. U.S.C.A. Const.Amend. 1.

[18] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

When the defendant's words lend themselves to more than one interpretation, the plaintiff in a libel action must establish either that the defendant knew that the words would convey a defamatory message, or had reckless disregard for their effect.

[19] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

The inquiry in determining whether false statements by publisher of a satirical article were motivated by actual malice is whether the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts.

[20] KeyCite Notes

237 Libel and Slander
237IV Actions
237IV(C) Evidence
237k112 Weight and Sufficiency

237k112(2) k. Intent, Malice, or Good Faith. Most Cited Cases

While the statutory definition of libel includes a statement that exposes a person to ridicule, evidence of intent to ridicule is not evidence of actual malice, as required to support a claim for libel; rather, actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff. V.T.C.A., Civil Practice & Remedies Code § 73.001.

[21] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

Ill will, spite, and bad motive are not the same as "actual malice," in the context of an action for libel.

[22] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(3) k. First Amendment Guaranties. Most Cited Cases

The First Amendment does not police bad taste. U.S.C.A. Const.Amend. 1.

[23] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases

The actual malice inquiry in the context of a libel action focuses on the defendant's state of mind as to whether a reasonable reader would be misled by the publication at the time of publication.

***147** Steven P. Suskin, Law Office of Steven P. Suskin, Phoenix, AZ, R. James George Jr., James Alan Hemphill, George & Donaldson, L.L.P., Peter D. Kennedy, Graves, Dougherty, Hearon & Moody, P.C., Austin, for Petitioner.

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Gregory S. Coleman, Weil Gotshal & Manges LLP, Austin, TX, for Amicus Curiae Association of American Publishers, Inc.

Justice JEFFERSON delivered the opinion of the Court.

This is a libel suit brought by a judge and a district attorney against a newspaper and its staff for publishing a satirical article the respondents contend was defamatory. The trial court denied the petitioners' motions for summary judgment, and the court of appeals affirmed. 91 S.W.3d 844. We reverse the court of appeals' judgment and render judgment that plaintiffs take nothing.

I

Factual Background

In November 1999, thirteen-year-old Christopher Beamon, a Ponder, Texas seventh grader, was arrested and detained for five days in a juvenile detention facility after the Halloween story he wrote as a school assignment was deemed to contain "terroristic threats." According to Beamon, his teacher assigned students the task of writing a scary story about being home alone in the dark and hearing noises ***148** Beamon penned a tale that described shooting a teacher and two classmates. He received a grade of 100, plus extra credit for reading it aloud in class. The school principal read the story and called juvenile authorities, who sent sheriff's deputies to remove Christopher from school. Denton County Juvenile Court Judge Darlene Whitten ordered Christopher detained at the Denton County Juvenile Detention Facility for ten days. She later approved an early release after five days, and Denton County District Attorney Bruce Isaacks declined to prosecute the case. He commented, "It looks like to me the child was doing what the teacher told him to do, which was to write a scary story. But this child does appear to be a persistent discipline problem for this school, and the administrators there were legitimately concerned." Brenda Rodriguez & Annette Reynolds, *Boy Freed After Story Lands Him in Cell; Ponder Seventh-Grader Wrote of Shooting Teacher, Students When Told to Pen Horror Tale,* DALLAS MORNING NEWS, Nov. 3, 1999, at 1A.

The widely-reported Beamon incident received national and international attention. *See, e.g., id.;* John Kass, *Fear of School Violence Getting Best of Common Sense,* CHICAGO TRIBUNE, Nov. 4, 1999, at 3; Josh Romonek, *Scary Halloween Essay Puts Student, 13, in Jail,* CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Nov. 4, 1999, at A2; Vin Suprynowicz, *So Simple, Even a Child Could Figure it Out,* LAS VEGAS REVIEW JOURNAL, Nov. 7, 1999, at 2D; Greg Torode, *Boy Jailed*

6 Days for Essay on Massacre, SOUTH CHINA MORNING POST, Nov. 4, 1999, at 1.
The *Dallas Observer,* a self-described "alternative newsweekl[y]" that focuses on reporting "in context and with perspective and sometimes with an individual's voice," published a satirical article lampooning the officials involved in the Beamon incident. The satire, written by Observer staff writer Rose Farley, ran in the *Observer's* November 11, 1999 print and online editions. [FN1]

FN1. The article and accompanying photograph are attached as an Appendix to this opinion.

Entitled "Stop the madness," the fictitious article described the arrest and detention of "diminutive 6 year-old" Cindy Bradley, who was purportedly jailed for writing a book report about "cannibalism, fanaticism, and disorderly conduct" in Maurice Sendak's classic children's book, *Where the Wild Things Are.* [FN2] Adjacent to the article was a picture of a smiling child holding a stuffed animal and bearing the caption, "Do they make handcuffs this small? Be afraid of this little girl." The article states that Bradley was arrested "without incident during 'story time' " at Ponder Elementary School and attributes fabricated words and conduct to Judge Darlene Whitten, District Attorney Bruce Issacks, and others.

FN2. MAURICE SENDAK, WHERE THE WILD THINGS ARE (Harper Collins 1963).

Other false quotes and bogus factual assertions were strewn throughout the piece. Judge Whitten was said to have ordered Bradley detained for ten days at the Denton

County Juvenile Detention Center while prosecutors contemplated whether to file charges. Whitten purportedly said: "Any implication of violence in a school situation, even if it was just contained in a first grader's book report, is reason enough for panic and overreaction.... It's time for you to grow up, young lady, and it's time for us to stop treating kids like children." Cindy was placed in ankle shackles "after [authorities] reviewed her disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet." The article noted that Isaacks had ***149** not yet decided whether to prosecute Cindy and quoted him as saying, "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits." Yet another fictional quote was attributed to Dr. Bruce Welch, the Ponder ISD Superintendent: "Frankly, these kids scare the crap out of me." The article claimed that school representatives would soon join several local faith-based organizations, including "the God Fearing Opponents of Freedom (GOOF)," in asking publishers to review content guidelines for children's books.

In describing Sendak's 1964 Caldecott Medal winning book, the article offered the only true quote in the entire piece:

The most controversial aspect of the book is contained in an early exchange between Max and his mother. It reads:

His mother called him 'WILD THING!'
and Max said 'I'LL EAT YOU UP!'
so he was sent to bed without eating anything.

The article asserts that although he had not read the book, then-governor George W. Bush purportedly "was appalled that such material could find its way into the hands of a Texas schoolchild. This book clearly has deviant, violent sexual overtones. Parents must understand that zero tolerance means just that. We won't tolerate anything." The

article concludes with Cindy "scoff [ing] at the suggestion that *Where the Wild Things Are* can corrupt young minds. 'Like, I'm *sure,*' she said. 'It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French.' "

Isaacks and **Whitten** demanded an apology, requested a retraction, and threatened to sue. In response, the *Buzz* column in the*Observer's* next edition (published November 18, 1999, one week after "Stop the madness") explained that the piece was a satire:

Buzz hates being one of those guys--commonly known as "losers" or "dateless"--who laboriously explains jokes. Unfortunately, some people-- commonly known as "clueless" or "Judge Darlene Whitten"--did not get, or did not appreciate, the joke behind the news story "Stop the madness," which appeared in last week's *Dallas Observer.*

....

Here's a clue for our cerebrally challenged readers who thought the story was real: It wasn't. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a 6-year-old girl in the slammer for writing a book report. Not yet, anyway.

Patrick Williams, *Buzz,* DALLAS OBSERVER, November 18-24, 1999, at 9.

II

Procedural Background

Isaacks and **Whitten** filed suit, claiming they were libeled by the "Stop the madness" article. [FN3] **Isaacks** and **Whitten** named as defendants New Times, Inc. (partial owner of the *Dallas Observer*), Dallas Observer, L.P. (publisher of the *Dallas Observer*), and Rose Farley, Julie Lyons, and Patrick Williams (the *Observer's* staff writer, editor-in-chief, and managing editor, respectively) (collectively, "New Times"). New Times moved for summary judgment, contending that, as a ***150*** matter of law: (1) an average or

reasonable reader would understand the article at issue as a satire or parody rather than actual statements of fact about the plaintiffs; and (2) New Times negated actual malice. On December 30, 2000, the trial court denied New Times's motion on the first point, holding that there was a fact question as to how the reasonable reader would understand the article. On the actual malice issue, the trial court held that "to establish actual malice, the Plaintiffs must prove that the Defendants intended the reasonable reader to interpret as actual, literal statements of fact those portions of the November 11, 1999 article that Defendants contend are parody or satire, taking into account the article as a whole." The court then denied summary judgment on the actual malice issue, finding that the plaintiffs required additional discovery.

FN3. Neither President Bush nor Dr. Welch sued the *Dallas Observer*. Dr. Welch did remark that, although he "like[s] satire like the best of them, [i]t's not as much fun when you [bear] the brunt of it." Angela Ward, *Denton Judge, DA Plan Libel Suit,* TEXAS LAWYER, November 22, 1999, at 1.

New Times filed an interlocutory appeal, pursuant to section 51.014(b), Texas Civil Practice and Remedies Code. That appeal was stayed pending further summary judgment proceedings in the trial court. New Times filed its second motion for summary judgment on February 15, 2001, which was denied by order dated May 29, 2001. New Times filed a second notice of appeal, and the two appeals were consolidated.

In what New Times contends is "the first [decision] in the nation finding a triable fact issue in a libel case brought by elected public officials over a political satire," the court of

appeals affirmed, holding that fact issues precluded summary judgment. 91 S.W.3d 844, 864. The court held that "satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead is subject to scrutiny as to whether it makes a statement of fact under defamation case law." *Id.* at 856. The court concluded that "[a]fter examining the evidence in the light most favorable to the non-movants, we hold there is evidence raising a genuine issue of material fact that the 'Stop the madness' article fails to provide any notice to a reasonable reader that it was a satire or parody and that a reasonable reader could conclude that the article made statements of fact." *Id.* at 859. On the actual malice issue, the court of appeals applied "the traditional test for actual malice, as articulated in *Turner* [*v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex.2000)]," and held that "there [was] evidence that the *Dallas Observer* knew or strongly suspected that when they published the article it was false and defamatory." *Id.* at 864. The court ordered New Times to pay attorney's fees and costs of the appeal and remanded to the trial court for a determination of those amounts. *Id.; see* Tex. Civ. Prac. & Rem.Code § 51.015.

We granted the petition for review to address the important constitutional issues raised by defamation claims involving satire. 46 Tex. Sup.Ct. J. 1204 (Sept. 25, 2003).

III

Satire

[1] New Times asserts that its statements are protected under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. "Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent,

we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002).

***151** As the court of appeals noted, "[s]atire, particularly realistic satire, is ... a distortion of the familiar with the pretense of reality in order to convey an underlying critical message." 91 S.W.3d at 854. According to one commentator, satire "deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils." GILBERT HIGHET, THE ANATOMY OF SATIRE 16 (1962). "Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air." *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir.1986) (Wilkinson, J., dissenting), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Perhaps the most famous example of satire is Jonathan Swift's 1729 essay, "A Modest Proposal," [FN4] in which he advocated that the children of the Irish poor be sold and slaughtered for meat. The article was intended to criticize English landlords and political economists, but Swift was widely criticized by those who misunderstood the satire.

FN4. The full title is "A Modest Proposal for preventing the children of poor people in Ireland, from being a burden on their parents or country, and for making them beneficial to the public."

In this country too, there has been a long and storied "tradition of satiric comment." *Falwell*, 805 F.2d at 487. Much of the comment went overboard, and much would be considered libelous today. For all its clatter and hubbub, however, it has not undermined this country's profound respect for presidents and priests. But it has enhanced political debate. Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed. An observant electorate may also gain by watching the reactions of objects of satiric comment, noting those who take themselves seriously and those whose self-perspective is somewhat more relaxed.
Id. at 487. Public figures generally bear the brunt of satire, and "[f]rom the Pickwick Papers of the 1830's to Colorado of the 1890's to Monty Python of the early 1970's, judges and the judiciary have been fair game for satirists." *Patrick v. Superior Court*, 27 Cal.Rptr.2d 883, 885 (Cal.Ct.App.1994).

[2] Thus, defamation claims involving humor in general, and satire in particular, raise important issues pertaining to free speech. "Humor is an important medium of legitimate expression and central to the well-being of individuals, society, and their government. Despite its typical literal 'falsity,' any effort to control it runs severe risks to free expression as dangerous as those addressed to more 'serious forms of communication.' " ROBERT D. SACK, SACK ON DEFAMATION § 5.5.2.7.1 (3d ed.2004) (hereafter "SACK ON DEFAMATION"). [FN5]

FN5. Judge Robert Sack sits on the United States Court of Appeals for the Second Circuit.

Is there a recognized exception from the laws of libel when

words otherwise defamatory are uttered in a humorous context? Of course, common sense tells us there must be. Humor takes many forms--sheer nonsense, biting satire, practical jokes, puns (clever and otherwise), one-liners, ethnic jokes, incongruities, and rollicking parodies, among others. Laughter can soften the blows dealt by a cruel world, or can sharpen the cutting edge of truth. Without humor--*152 the ability to recognize the ridiculous in any situation--there can be no perspective. Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract. *Salomone v. MacMillan Publ'g Co.*, 97 Misc.2d 346, 411 N.Y.S.2d 105, 108 (Sup.Ct.1978), *rev'd on other grounds*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (N.Y.App.Div.1980).

We must consider, then, how best to balance potential defamation liability with constitutional concerns when a satirical communication is at issue. One commentator suggests that "[a]dequate protection for most humor can be found in ordinary common-law defamation principles." SACK ON DEFAMATION § 5.5.2.7.1.

Much humor is a form of opinion or criticism, protected under the common-law defense of "fair comment" or the doctrines suggested by the Supreme Court cases: that there are "constitutional limits on the type of speech which may be the subject of state defamation actions," such as "rhetorical hyperbole" and "vigorous epithets," and the requirement that the statements at issue be reasonably interpreted as alleging facts.

Humor is usually understood to be humor and to convey no serious, objective factual allegations about its target. Although perhaps annoying or embarrassing, humorous statements will have no substantial impact on reputation and therefore ought not to be held to be defamatory. Incidental jibes and barbs may be humorous forms of

epithets or "mere name-calling" and are not actionable under settled law governing such communications. And it is on these bases that most humor cases are decided. *Id.* (citations omitted).

The United States Supreme Court, sensitive to the constitutional issues involved in imposing liability for speech, has applied the *New York Times v. Sullivan* standard to a case involving parody. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). In that case, evangelist Jerry Falwell sued Hustler Magazine over an ad parody published in Hustler's November 1983 issue. The inside front cover of that issue featured a parody of an advertisement for Campari Liqueur that contained Falwell's name and photograph and was entitled "Jerry Falwell talks about his first time." Hustler modeled the parody after actual Campari ads that included interviews with various celebrities who discussed their "first times." Although it was apparent by the end of the interviews that the ads referred to the celebrities' first experience sampling Campari, "the ads clearly played on the sexual double entendre of the general subject of 'first times.' " *Id.* at 48, 108 S.Ct. 876. The Hustler parody's form and layout mimicked the Campari ads. Hustler's editors selected Falwell as the featured celebrity and drafted an alleged "interview" with him in which he stated that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. *Id.* The parody depicted Falwell and his mother as drunk and immoral and suggested that Falwell was a hypocrite who preached only when drunk. *Id.* At the bottom of the page, the ad bore the disclaimer, "ad parody--not to be taken seriously." *Id.* at 49, 108 S.Ct. 876. The magazine's table of contents also identified the ad as "Fiction; Ad and Personality Parody." *Id.*

The jury found that the Hustler ad parody could not "

'reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated' " and returned a verdict in Hustler's favor on Falwell's defamation claim. ***153** *Id.* at 57, 108 S.Ct. 876 (quoting appendix to petition for certiorari). Nonetheless, the jury awarded Falwell damages for intentional infliction of emotional distress, and the Fourth Circuit Court of Appeals affirmed. *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir.1986). The Supreme Court granted certiorari to "consider whether [the intentional infliction of emotion distress] award [was] consistent with the First and Fourteenth Amendments of the United States Constitution." *Falwell*, 485 U.S. at 48, 108 S.Ct. 876. Chief Justice Rehnquist, writing for the Court, concluded that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 56, 108 S.Ct. 876.

The Court noted that the *New York Times Co. v. Sullivan* actual malice standard protected the parody from an intentional infliction of emotional distress claim:

Since *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280, 84 S.Ct. 710. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an

individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. *See* Gertz, 418 U.S., at 340, 344, n. 9, 94 S.Ct. 2997. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, 94 S.Ct. 2997 and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' " *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (quoting *New York Times, supra*, at 272, 84 S.Ct. 710). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability. 485 U.S. at 52, 108 S.Ct. 876.

The Court rejected the notion that, because the *Hustler* parody was particularly outrageous, it could be distinguished from traditional political cartoons:

There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike ***154** of a particular expression. An "outrageousness" standard thus runs afoul of our

longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action"). And, as we stated in FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978): "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745-746, 98 S.Ct. 3026. *See also* Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)("It is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Id. at 55-56, 108 S.Ct. 876. The Court concluded that Falwell's intentional infliction of emotional distress claim could not, "consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here." *Id.* at 57, 108 S.Ct. 876. Accordingly, the Supreme Court reversed the court of appeals' judgment. [FN6] *Id.*

FN6. In a two sentence concurrence, Justice White wrote, "As I see it, the decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication

of the parody, cannot be squared with the First Amendment." *Falwell*, 485 U.S. at 57, 108 S.Ct. 876 (White, J., concurring).

A. The Reasonable Reader and "Stop the madness"

Thus, we must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We are guided in our analysis by the United States Supreme Court's handling of the constitutional issues presented by the ad parody in *Falwell*. Additionally, we agree with Judge Sack's observation that common-law defamation principles--with some adjustments--provide adequate protection for satire. SACK ON DEFAMATION § 5.5.2.7.1. We turn, then, to our standards for evaluating allegedly defamatory communications.

[3] [4] "We have long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex.2000) (citing *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 655 (Tex.1987), *Guisti v. Galveston Tribune Co.*, 105 Tex. 497, 150 S.W. 874, 878 (1912), and *Kapellas v. Kofman*, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969)(en banc)). Falsity for constitutional purposes depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement. ***155** *Id.* at 116, 81 Cal.Rptr. 360, 459 P.2d 912.

Whether a publication is capable of a defamatory meaning is initially a question for the court. *Id.* at 114, 81 Cal.Rptr. 360, 459 P.2d 912. But when a publication is of ambiguous or doubtful import, the jury must determine its meaning. *Id.*

We have never before applied these principles to a satirical article, however. New Times asserts that "Stop the madness" is rhetorical hyperbole, protected under the First Amendment. *See, e.g., Letter Carriers v. Austin,* 418 U.S. 264, 282-83, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). In *Greenbelt,* the Supreme Court considered whether a newspaper story that referred to a position the plaintiff had taken at city council meetings as "blackmail" was actionable. 398 U.S. at 7, 90 S.Ct. 1537. The trial court and the court of appeals viewed the use of the word as charging the crime of blackmail, and because the paper knew the plaintiff had committed no such crime, it was liable for the "knowing use of falsehood." *Id.* at 6, 90 S.Ct. 1537. The Supreme Court rejected this holding:

> We hold that the imposition of liability on such a basis was constitutionally impermissible- that as a matter of constitutional law, the word 'blackmail' in these circumstances was ... not libel.... No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position extremely unreasonable.

Greenbelt, 398 U.S. at 13-14, 90 S.Ct. 1537. Similarly, in *Letter Carriers,* the Supreme Court held that a publication's description of non-union individuals as

"scabs" was not actionable. Relying on *Greenbelt*, the Court noted that it was "similarly impossible to believe that any reader ... would have understood the newsletter to be charging the appellees with committing the criminal offense of treason. As in [*Greenbelt*], Jack London's 'definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Letter Carriers*, 418 U.S. at 285-86, 94 S.Ct. 2770.

Most recently, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court noted that the "[*Greenbelt*]-*Letter Carriers*-*Falwell* line of cases provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 20, 90 S.Ct. 1537 (quoting *Falwell*, 485 U.S. at 50, 108 S.Ct. 876); *see also* Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L.REV. 717, 735 (2004). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20, 110 S.Ct. 2695.

Other courts have applied these holdings to create a workable standard for cases involving satire or parody. *See, e.g.*, SACK ON DEFAMATION § 5.5.2.7.1; *see also* Jan Kipp Kreutzer, *Defamation: Problems with Applying Traditional Standards to Non-Traditional Cases--Satire, Fiction and "Fictionalization,"* 11 N. KY. L.REV. 131, 134 (1984) (noting that "[t]he *Greenbelt* 'rhetorical hyperbole' principle has ... been helpful to defendants in cases involving humor, satire and new ***156** types of literary expression"). For example, in *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir.1982), *cert. denied*, 462

U.S. 1132, 103 S.Ct. 3112, 77 L.Ed.2d 1367 (1983), the court considered the appropriate test for determining whether Penthouse could be liable for publishing a spoof of the Miss America contest. In that case, Penthouse published an article about "Charlene," a Miss Wyoming at the Miss America pageant. The article described Miss Wyoming during the talent portion of the competition and depicted her performing sexual acts with her coach and others. The real Miss Wyoming sued Penthouse for defamation. The jury found that the plaintiff Pring was the Miss Wyoming about whom the article was written. Nonetheless, the Tenth Circuit Court of Appeals reversed the district court's judgment and directed the trial court to set aside the verdict and dismiss the action. Relying on *Letter Carriers* and *Greenbelt,* the court held:

> The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but *whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.* If it could not be so understood, the charged portions could not be taken literally. This is clearly the message in *Greenbelt* and *Letter Carriers.*

695 F.2d at 442 (emphasis added). The court concluded that, because the story described something physically impossible in an impossible setting, it was "simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else." *Id.* at 443.

In *Hustler Magazine v. Falwell,* the district court incorporated the *Pring* test into the jury instructions on Falwell's libel claim. 485 U.S. at 57, 108 S.Ct. 876 (jury found that "the Hustler ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.' " (quoting

appendix to petition for certiorari)); Brief for the Petitioners at 21, *Hustler Magazine v. Falwell,* (No. 86-1278); *see also* *Milkovich,* 497 U.S. at 20, 110 S.Ct. 2695. Other courts have adopted variations of this test. *See, e.g.,* *Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1193-94 (9th Cir.1989) (Hustler features mentioning Dworkin's name in a derogatory fashion were "privileged opinion" because they could not be "reasonably understood as statements of fact."); *San Francisco Bay Guardian, Inc. v. Superior Court,* 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 467 (1993) (average reader would recognize phony letter to the editor as "a fake and a joke"); *Walko v. Kean College,* 235 N.J.Super. 139, 561 A.2d 680, 683 (Ct. Law Div.1988) ("A parody or spoof that no reasonable person would read as a factual statement, or as anything other than a joke--albeit a bad joke--cannot be actionable as a defamation.") (citing *Pring*); *Myers v. Boston Magazine Co., Inc.,* 380 Mass. 336, 403 N.E.2d 376, 379 (1980) (reasonable reader would not understand satire to state actual fact); *Garvelink v. Detroit News,* 206 Mich.App. 604, 522 N.W.2d 883, 886 (1994) (As a matter of law, satirical article could not "reasonably be interpreted as stating actual facts about the plaintiff and ... is, therefore, protected speech."); *Hoppe v. Hearst Corp.,* 53 Wash.App. 668, 770 P.2d 203, 206 (1989) (adopting *Pring* test and holding that parody was non-actionable as a matter of law).

[5] We believe *Pring* appropriately sets the standard for liability in cases of satire or parody, while providing freedom of expression its necessary "breathing ***157** space." *Falwell,* 485 U.S. at 52, 108 S.Ct. 876. Thus, in such cases, the test is whether the publication could be reasonably understood as describing actual facts. *Pring,* 695 F.2d at 442. Although the court of appeals' articulation of this standard was largely correct, *see* 91 S.W.3d at 855

(holding that statements are protected "if a reasonable reader would understand that they do not state an actual fact" and "the meaning of a publication, and thus whether it is false and defamatory, depends upon how a person of ordinary intelligence would perceive the publication") (citing *Turner*, 38 S.W.3d at 114), we disagree with the conclusion that "[t]he *Dallas Observer* provided *no obvious clues* to the average reader that the article was not conveying statements of actual fact" and "the 'Stop the madness' article fails to provide *any notice* to a reasonable reader that it was a satire or parody." 91 S.W.3d at 857, 859 (emphasis added).

[6] The court of appeals has underestimated the "reasonable reader."

As the relevant cases show, the hypothetical reasonable person--the mythic Cheshire cat who darts about the pages of the tort law--is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.

Patrick v. Superior Court, 27 Cal.Rptr.2d 883, 887 (Cal.Ct.App.1994). The person of "ordinary intelligence" described in *Turner* is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications. *See Turner*, 38 S.W.3d at 114; *see also Patrick*, 27 Cal.Rptr.2d at 887-88.

[7] The appropriate inquiry is objective, not subjective. Thus, the question is not whether some actual readers were mislead, as they inevitably will be, [FN7] but whether the hypothetical reasonable reader could be. *See San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 467(1993) ("The fact

that real party furnished declarations of a few people who stated that they did not recognize the letter as a joke does not raise a question of fact as to the view of the average reader. The question is not one that is to be answered by taking a poll of readers but is to be answered by considering the entire context in which the offending material appears."); *see also* BRUCE W. SANFORD, LIBEL & PRIVACY 193- ***158** 94(2d ed. 1991) ("Dry irony ... creates a greater risk of being misunderstood as an assertion of fact than slapstick, but nonetheless it is entitled to protection. We should hardly encourage the development of libel law that rewards low humor."). Thus, we focus on a single objective inquiry: whether the satire can be reasonably understood as stating actual fact.

FN7. For example, earlier this year, the *Beijing Evening News,* in a story written by Huang Ke, reported that Congress was threatening to bolt Washington, D.C. unless it got a new, modern Capitol building, complete with retractable roof. Daniel Terdiman, *Onion Taken Seriously, Film at 11,* WIRED, April 14, 2004, at http:// www.wired.com/news/culture/0,1284,63048,00.html (last visited Sept. 1, 2004 and available in Clerk of Court's file). Unfortunately, Ke's source for this information was *The Onion,* the satirical publication that bills itself as "America's Finest News Source." *Id.* The *Evening News* later apologized but blamed *The Onion,* writing that "[s]ome small American newspapers frequently fabricate offbeat news to trick people into noticing them with the aim of making money." *Id.* (quoting *Beijing Evening News*). According to Carol Kolb, *Onion* editor, "People every single day think *The Onion* stories are real." *Id.* One piece, called "Al-Qaida Allegedly Engaging in Telemarketing," prompted the Branch County, Michigan sheriff's department to issue an urgent press release

warning of the purported practice. *Id.* In a similar vein, an article entitled "Chinese Woman Gives Birth to Septuplets: Has One Week to Choose" provoked prayer vigils on behalf of the six babies who would be rejected. *Id.* Additionally, Deborah Norville reported on MSNBC that more than half of all exercise done in the United States happens in TV infomercials for workout machines, a "statistic" obtained from an *Onion* article. *Id.*

[8] This is not the same as asking whether all readers actually understood the satire, or "got the joke." Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law, does not. In a case of parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them.

[9] In this case, the court of appeals distinguished other cases finding satire to be protected under the First Amendment, holding that, in those cases, "the reader was given obvious clues that the piece was not conveying statements of actual facts." 91 S.W.3d at 858. But, to a careful reader, the clues here are no less suggestive. They include:

- the unorthodox headline ("Stop the madness") and photo of a smiling child holding a stuffed animal, captioned "Do they make handcuffs this small? Be afraid of this little girl."
- the article's assertion that the six-year-old child was placed in ankle shackles due to her school disciplinary record, "which included reprimands for spraying a boy with pineapple juice and sitting on her feet."

• the fabricated quote attributed to then-Governor George W. Bush, stating that *Where the Wild Things Are* "clearly has deviant, violent, sexual overtones" and that "zero tolerance means just that. We won't tolerate anything."
• reference to Isaacks's "quote" that "[w]e've considered having her certified to stand trial as an adult, but even in Texas there are some limits."
• Judge Whitten's alleged statement that "[a]ny implication of violence in a school setting ... is reason enough for panic and overreaction."
• The article's reference to a freedom-opposing religious group that bears a ridiculous acronym: God Fearing Opponents of Freedom ("GOOF").
• Six-year-old Cindy Bradley's scoffing at the reaction to her book report and saying, "Like, I'm sure. It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

These clues (among others) involve "exaggeration or distortion," the means by which "the satirist clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticism or opinion, a means of reaching an abstract truth or idea." Jan Kipp Kreutzer, *Defamation: Problems with Applying Traditional Standards to Non-Traditional Cases--Satire, Fiction and "Fictionalization,"* 11 N. KY. L.REV. 131, 144 (1984). And their combined effect provides a signal to the reasonable reader that the piece is satirical. Would a six-year-old be able to comment intelligently on the works of Salinger and Twain, while using expressions like "[e]xcuse my French"? Would a faith-based organization label itself "GOOF"? Would a judge say that it is time to panic and overreact? *See* Patrick, 27 Cal.Rptr.2d at 887 ("[T]he reasonable person has some feel for the nuances of law and language."). The reasonable

reader would not consider ***159** each of these clues in isolation, but would synthesize each signal as part of the larger determination of whether "Stop the madness" can reasonably be interpreted as stating actual facts.

[10] Some satire, like the article at issue here, relies for its force and effect on the idea of attribution of ideas and words to someone who never uttered them. The satiric effect emerges only as the reader concludes by the very outrageousness of the words that the whole thing is a put-on. The comic effect is achieved because the reader sees the words as the absurd expression of positions or ideas associated with the purported author. *Patrick*, 27 Cal.Rptr.2d at 886. It is not surprising, therefore, that respondents complain that only readers who read the entire article would "get" the joke. As they argue, "many readers will read the first few paragraphs of an article and form an opinion." But we cannot impose civil liability based on the subjective interpretation of a reader who has formed an opinion about the article's veracity after reading a sentence or two out of context; that person is not an objectively reasonable reader. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

The court of appeals found it persuasive that the article was "indexed and published as the lead story under the heading of 'News' in a section ordinarily devoted to hard-hitting investigative news." 91 S.W.3d at 859. The article's inclusion in the *Observer's* "News" section must be examined in the context of the *Observer's* nature, however, because the reasonable reader must consider the type of publication in which the offending material appears. *See, e.g.*, BRUCE W. SANFORD, LIBEL AND PRIVACY 193

n. 187 (2d ed. 1999) ("The context that a humorous article appears in may determine the outcome in a close case."); *Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376, 379 (1980) (courts must "examine the statement in its totality in the context in which it was uttered," including the medium in which it was published and the audience to whom it was disseminated); *Walko v. Kean College*, 235 N.J.Super. 139, 561 A.2d 680, 684 (Ct. Law Div.1988) ("Our case law has made it abundantly clear that a challenged publication must be viewed in context to determine whether or not it is subject to a defamatory meaning."); *see also Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex.1987) ("The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.").

Here, the record establishes that the *Dallas Observer* is an alternative weekly newspaper that "report[s] the news in context and with perspective and sometimes with an individual's voice." Julie Lyons, the *Observer's* editor, described the newspaper as follows:

> at a daily newspaper when you're reporting a news story, you might write the mayor said so-and-so and the counsel [sic] member said so-and-so. We call that a he said she said kind of story. Whereas at the *Dallas Observer* we might say the mayor said so-and-so. The counsel [sic] member said so-and-so, but the counsel [sic] member's lying.

The "News" heading was used to delineate a section of the newspaper and not to indicate that articles contained in that section were "traditional news"--in fact the record establishes that opinion, commentary, and satire had previously been published ***160** in the "News" section, as the *Observer* did not have a separate opinion section.

Additionally, the court of appeals' statement that "Stop the madness" was "both indexed and published as the lead story under the heading of 'News,' " 91 S.W.3d at 859, appears to be erroneous--the article was not the lead story and was not indexed at all; it was not even mentioned in the table of contents. The nearby article describing awards won by *Observer* staff could suggest that "Stop the madness" was a news article, but it is just one of many factors to be considered. *Cf. Walko v. Kean College*, 235 N.J.Super. 139, 561 A.2d 680, 684 (Ct. Law Div.1988) (fact that parody was surrounded by other, humorous articles supported interpretation that reasonable reader would not have taken it seriously).

Moreover, "Stop the madness" was not the first satire the *Observer* published. In earlier issues, the *Observer* had spoofed the music industry's issuance of "[b]oring and exhaustive box sets of irrelevant material"; the Dallas Area Rapid Transit light rail system (providing tips for safer rides, including "never lend your handgun to a stranger," "share your ammo," and "carry tissues, Lysol, and an extra drool cup for your seatmate"); and the Belo Corporation's part ownership of the Dallas Mavericks (in an article entitled "Belo's Sure Got Balls"). Perhaps the *Observer's* general tenor can best be gleaned by examining the November 18, 1999 *Buzz* column, in which Patrick Williams explained the *Observer's* decision to lampoon **Isaacks** and **Whitten.** Williams wrote:

The reaction [to the Christopher Beamon incident] at the *Observer* was that this was an outrageous, idiotic abuse of power. OK, we didn't express it quite that way. "Whoa, dude, that's f[* *]ked up," is closer to what was said. Luckily for us, we work for a newspaper that lets us ridicule the ridiculous. Farley, grinning like a rottweiler about to bite a baby, drew the writer's sharpest weapon, satire, and set about to make a few points.

Patrick Williams, *Buzz,* DALLAS OBSERVER, November 18-24, 1999, at 9 (expletive deleted).
The reference in "Stop the madness" to the actual Beamon incident provides yet another signal to the reasonable reader, who would have understood the satire to be commentary on that controversy. *See, e.g.,* Lane v. Ark. Valley Publ'g Co., 675 P.2d 747, 750-51 (Colo.Ct.App.1983) (noting that context in which satirical articles were published was significant: "comments made in the context of a hotly contested political campaign should not be judged by the same standard as those made in other contexts" and topics at issue "had been the subject of extensive reporting and controversy"); *Garvelink,* 522 N.W.2d at 887 (column was "obviously satire intended to criticize the school budget cuts, which was a controversial issue at the time"); *Hoppe,* 770 P.2d at 207 (satirical column critical of plaintiffs' use of public funds was published during a political campaign and in the context of "a well publicized debate" over the plaintiff's use of public funds to hire detectives); *see also Patrick,* 27 Cal.Rptr.2d at 889-90 (when viewed in the context of the "running feud" between the judge and the newspaper, it was unreasonable to believe that judge himself had written phony, satirical memo). It does not, as the court of appeals held, support a finding that a reasonable reader would have misunderstood the satire. 91 S.W.3d at 859.

[11] Finally, while a disclaimer would have aided the reasonable reader in determining the article was a satire, such a disclaimer is not necessarily dispositive. *See, e.g.,* ***161** *Falwell v. Flynt,* 805 F.2d at 486- 87 (Wilkinson, J., dissenting) (noting that, despite label proclaiming "Ad Parody--Not to be Taken Seriously," Flynt could have been subject to a libel judgment if the publication were found to be defamatory); *Pring v. Penthouse Int'l, Ltd.,* 695 F.2d

438 (10th Cir.1982) ("The test is not whether the story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication" but whether story could reasonably be interpreted as stating actual fact). Rather, the presence of a disclaimer is one of many signals the reasonable reader may consider in evaluating a publication. *See, e.g.*, *San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 466 (1993) (noting that "[t]he question of whether the average reader would have recognized the issue as a parody and the letter as a part of the joke depends upon a view of the entire issue, i.e., the 'totality of circumstances' "; fact that phony letter to the editor was in a section of the newspaper labeled "special parody section" was significant).

"Stop the madness" does have a superficial degree of plausibility, but such is the hallmark of satire. *See, e.g.*, Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 557 (1999) ("Satire works precisely because it evokes other materials."); *cf. San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 466 (1993) ("[T]he very nature of parody ... is to catch the reader off guard at first glance, after which the 'victim' recognizes that the joke is on him to the extent that it caught him unaware."). That does not necessarily make it actionable, however. While a reader may initially approach the article as providing straight news, "Stop the madness" contains such a procession of improbable quotes and unlikely events that a reasonable reader could only conclude that the article was satirical. On balance, the obvious clues in the article itself, the *Observer's* general and intentionally irreverent tone, its semi-regular publication of satire, as well as the satire's timing and commentary on a then-existing controversy, lead us to conclude that "Stop the madness"

could not reasonably be understood as stating actual facts about **Isaacks** and **Whitten.** The court of appeals erred in holding otherwise.

B. Actual Malice

[12] [13] Even if the article were reasonably understood as stating actual facts about the respondents, however, respondents could proceed with their claim only if they raised a fact issue on actual malice. Public figures cannot recover for defamatory statements made about them absent proof of actual malice. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170-71 (Tex.2003) (citing *N.Y. Times*, 376 U.S. at 279-80, 84 S.Ct. 710 and *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998)). But "[t]he phrase actual malice is unfortunately confusing in that it has nothing to do with bad motive or ill will," but rather is "a shorthand to describe the First Amendment protections for speech injurious to reputation." *Bentley v. Bunton*, 94 S.W.3d 561, 590 (Tex.2002) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n. 7, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991)); *Letter Carriers*, 418 U.S. at 281, 94 S.Ct. 2770 ("[I]mpos[ing] liability on the basis of the defendant's hatred, spite, ill will, or desire to injure [is] 'clearly impermissible.' "); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967) (noting actual malice cannot be based merely on defendant's " 'bad or corrupt motive,' " " 'personal spite, ill will or a ***162** desire to injure plaintiff' "). As the Supreme Court noted:

[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v.*

Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73, 88 S.Ct. 197.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Falwell, 485 U.S. at 53, 108 S.Ct. 876.

[14] [15] [16] [17] [18] Instead, "actual malice" requires proof that the defendant made a statement " 'with knowledge that it was false or with reckless disregard of whether it was true or not.' " *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex.2000) (quoting *N.Y. Times*, 376 U.S. at 279-80, 84 S.Ct. 710). Reckless disregard is a subjective standard, focusing on the defendant's state of mind. *Bentley*, 94 S.W.3d at 591. Mere negligence is not enough. *Id.* Rather, the plaintiff must establish " 'that the defendant in fact entertained serious doubts as to the truth of his publication,' " or had a " 'high degree of awareness of ... [the] probable falsity' " of the published information. *Id.* (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)). Constitutional malice generally consists of " '[c]alculated falsehood.' " *Bunton*, 94 S.W.3d at 591 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). When the defendant's

words lend themselves to more than one interpretation, the plaintiff must establish either that the defendant knew that the words would convey a defamatory message, or had reckless disregard for their effect. *See* Bunton, 94 S.W.3d at 603.

Applying the actual malice standard to a satirical work may "become [ ] confused because the author is usually well aware of any 'falsity' contained in the comment and indeed intends no 'truth.' That sounds like 'actual malice.' " SACK ON DEFAMATION § 5.5.2.7.1. Respondents advocate this very sort of "automatic actual malice" standard in satire cases, because the author always knows the publication contains false statements of fact. They assert that "[i]n the parody context, the reporter's subjective belief is irrelevant, because he always knows thatwhat he is publishing is not true." But we cannot square such a blanket rule with the protections of the First Amendment. In a pre-*Hustler Magazine v. Falwell* text, one commentator warned against a literal application of the *New York Times* rule in the satire/parody context:

[I]f someone wishes to convey the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images. The problem ... may be that courts will follow too literally the fact/opinion dichotomy suggested in *Gertz*, find that knowingly false assertions *of fact* have been made, and conclude that such assertions are unprotected both under ***163** common law and constitutional principles. It may be difficult, depending on the particular work and the particular forum, to persuade a judge that statements of fact are, under certain circumstances, not statements of fact at all, but of opinion.

ROBERT D. SACK, LIBEL, SLANDER AND RELATED

PROBLEMS § V.6.5.7, at 246- 47 (1980).
In *Hustler Magazine v. Falwell,* the United States Supreme Court implicitly rejected a literal application of the actual malice rule to works involving satire or parody. If the Supreme Court had literally applied the actual malice test as set forth in *Falwell,* it would have found liability because neither party contested the fictional nature of the parody, and Hustler knew the statements were fictional when it published the article. While the Supreme Court does not detail how to apply this standard to cases of satire or parody, its rejection of liability means that it could not have applied the standard literally.

[19] New Times asserts that the court of appeals' articulation of the actual malice test was "largely appropriate," and we agree. The court of appeals, citing *Turner,* articulated the issue as: "Did the publisher either know or strongly suspect that the article was misleading or presented a substantially false impression?" 91 S.W.3d at 862. As this is not a case of libel by impression (as *Turner* was), however, we believe the inquiry is more properly stated as: did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts? [FN8] *Bentley,* 94 S.W.3d at 603; *see also Pring,* 695 F.2d at 442.

FN8. New Times proposes that the Court adopt Chief Justice Phillips's concurrence in *Bentley,* which advocated an "intent" standard for actual malice. *Bentley,* 94 S.W.3d at 616 (Phillips, C.J., concurring and dissenting) (actual malice requires proof "that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material") (quoting *Saenz v. Playboy Enters., Inc.,* 841 F.2d 1309, 1318 (7th Cir.1988)) (emphasis added). In fact, the trial

court applied this standard but found a fact issue on actual malice. Under either an intent standard or a knowledge standard, however (as more fully explained below), **Isaacks** and **Whitten** have failed to raise a fact issue on actual malice.

In conducting the actual malice inquiry, the court of appeals dismissed the individual defendants' affidavits as "conclusory and ... therefore not competent summary judgment evidence." 91 S.W.3d at 863. Additionally, the court concluded that the affidavits of Farley, Williams, and Lyons were controverted by their deposition testimony. *Id.* We disagree with both propositions.

In *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989), we held that a reporter's summary judgment affidavit could conclusively establish a lack of actual malice so long as it was "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." As we later noted:

Although we chose in *Casso* not to carve out a special exception to our summary judgment practice for public figure and public official defamation cases, the court, in overruling *Bessent* [*v. Times-Herald*, 709 S.W.2d 635 (Tex. 1986)] and *Beaumont Enterprise* [*& Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985)] made it possible for defendants to obtain a summary judgment in such cases. In *Casso*, the defendant (Casso) submitted an affidavit and supporting evidence establishing that he did not believe that certain allegations he made were false and that he did not act with reckless disregard as to their truth or falsity in ***164** repeating those allegations in his campaign advertising. As evidence supporting his motion for summary judgment, Casso submitted his affidavit and certain testimony from a pending federal trial. He asserted

in his affidavit that this testimony formed the basis of his allegedly defamatory statements. The court in *Casso* held that because the plaintiff, Brand, "presented no controverting proof, summary judgment as to these statements was proper."
Carr v. Brasher, 776 S.W.2d 567, 571 (Tex.1989) (holding that defendants' affidavits and deposition testimony negated actual malice where plaintiff "presented no controverting proof that [the defendants] believed that the statements in question were false or published with reckless disregard for the truth"); *see also Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 417 (Tex.2000); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 574 (Tex.1998). Thus, under our framework, because these affidavits are from interested witnesses, they will negate actual malice as a matter of law only if they are "clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and [able to be] readily controverted." Tex.R. Civ. P. 166a(c); *see also Huckabee*, 19 S.W.3d at 424; *Casso*, 776 S.W.2d at 558.
In support of its summary judgment motion on actual malice, New Times presented affidavits from Farley, Williams, and Lyons. The affidavits detailed the writing, editing, and publication of "Stop the madness." In her affidavit, Farley explained that she "had the idea to write something for the Dallas Observer that would be a takeoff or satire of the Beamon incident." She described a conversation with Williams in which they discussed whether they wanted the story to be a "prank intended to fool readers or whether the story should be outrageous enough that the readers would be let in on the joke.... We agreed that [the story] should be constructed so that readers would be attracted to it and then would clearly be signaled that the article was a satire or parody." Farley testified that she never intended that the article be taken as an account of

actual events and that she neither knew nor believed that it would be understood that way. She detailed "very specific steps to make sure that this was obviously a satire," including using a very young child as protagonist, placing her in ankle shackles, inventing the religious group "GOOF," and adding fictional quotes.

Williams testified in a similar vein. He explained that their "goal was to make [the story] clearly satirical while not so overbroad as to be sophomoric. We intended the article to poke fun at those involved in the Christopher Beamon matter, as well as the dry 'daily news' type of journalism that often overlooks the broader issues." Williams testified that he did not intend the article to be taken as an account of an actual event and did not know or believe that the article's readers would mistake it for one.

Like Farley and Williams, Julie Lyons, the Observer's editor-in-chief, also gave a detailed affidavit. She testified that there was no intent that "Stop the madness" be taken as stating actual historical fact. She described reviewing a draft and suggesting that the article be edited to make it funnier and more obviously satire. She described the choice to use a six-year-old: "We knew that a child that young would clearly signal to the reader that it was fictitious because a child that young can't be detained."

These affidavits are "clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." ***165** Tex.R. Civ. P. 166a(c). They are not, as the court of appeals held, "conclusory." 91 S.W.3d at 863. The affidavits do not merely deny actual malice, they provide detailed explanation of the affiants' state of mind and descriptions of steps taken to ensure that the article was understood to be fiction. The affidavits establish New Times's lack of actual malice; none of the witnesses knew or had reckless disregard for whether the satire would be taken as stating

actual facts, nor is there any evidence that they intended such a result. [FN9] Unless **Isaacks** and **Whitten** raised a fact issue, therefore, New Times has negated actual malice as a matter of law.

FN9. *See* footnote 8, *supra*.

[20] **Isaacks** and **Whitten**--and the court of appeals--relied on the respondents' deposition testimony. In fact, the court's actual malice finding appears to have been based largely on evidence that the Dallas Observer intended to ridicule those officials. *See* 91 S.W.3d at 863-64 (noting that Farley "admitted the article was intended to hold **Isaacks** and **Whitten** up to public ridicule"; that Williams "agreed the article was meant as satire or scathing commentary"; and that Lyons "agreed that the story would hold these public officials up to public ridicule"). But, while the statutory definition of libel under Texas law includes a statement that exposes a person to ridicule, *see* Tex. Civ. Prac. & Rem.Code § 73.001, evidence of intent to ridicule is not evidence of actual malice. Rather, actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff. *See Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34, 42 (N.Y.1993) (distinguishing between actual malice, which "focuses on the defendant's state of mind in relation to the truth or falsity of the published information," and common-law malice, which "focuses on the defendant's mental state in relation to the plaintiff"); *Hoppe v. Hearst Corp.*, 53 Wash.App. 668, 770 P.2d 203, 208 (1989) ("The standard for finding actual malice is subjective, and focuses on the declarant's belief in, or attitude toward, the truth of the communication at issue.").

[21] Equating intent to ridicule with actual malice would curtail the "uninhibited, robust, and wide-open" public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody. *Sullivan*, 376 U.S. at 270, 84 S.Ct. 710; *cf. id.* at 273, 84 S.Ct. 710 ("Criticism of [government officials'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."). Moreover, relying on such evidence ignores the Supreme Court's repeated admonitions that ill will, spite, and bad motive are not the same as actual malice. Indeed, the very purpose of satire is ridicule, but this does not make it a sort of second-class speech under the First Amendment. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2017(1961) (defining "satire" as "a usu. topical literary composition holding up human or individual vices, folly, abuses, or shortcomings to censure by means of ridicule, derision, burlesque, irony, or other method sometimes with an intent to bring about improvement").

In fact, reliance on intent to ridicule as evidence of actual malice contravenes *Falwell* itself. In that case, Falwell's evidence that Flynt intended to cause him distress rested on Flynt's deposition testimony that he had intended to "upset" Falwell, that he had wanted "[t]o settle a score" because Falwell had labeled Flynt's personal life "abominable," and that Flynt wanted to ***166** "assassinate" Falwell's integrity. Deposition Testimony of Larry Flynt, *reprinted in* Joint Appendix at 113, 136, 141, *Hustler Magazine v. Falwell*, 485 U.S. at 56, 108 S.Ct. 876). Despite this evidence, the Supreme Court held that Falwell could not recover for intentional infliction of emotional distress without proof of actual malice, and the Court

reversed the Fourth Circuit's judgment. As one commentator has noted, "the regulation of improper intentions, although important for the civil law of torts, is constitutionally inappropriate 'in the area of public debate about public figures.' " Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L.REV. 603, 613 (1990)(quoting *Falwell,* 485 U.S. at 53, 108 S.Ct. 876).

As further evidence of the *Observer's* purported malice, the court of appeals pointed to editor-in-chief Julie Lyons's actions: "She never considered labeling the article as parody or satire. She later realized that some readers thought that the article was real and she changed the heading of the on-line version to satire." 91 S.W.3d at 864. Lyons also responded to each reader query she received about the story and explained that it was a satire. Additionally, the court gave weight to Patrick Williams's testimony that he wrote a response in his "Buzz" column, calling readers who believed the report "cerebrally challenged" and "clueless," and that "he never considered the possibility that someone might not be able to tell that the article was fictional satire." *Id.* at 863.

But contrary to the court of appeals' opinion, New Times's prompt labeling and clarification in the next edition's *Buzz* column, as well as its explanatory responses to readers, evidence a lack of actual malice. *See, e.g., Washington Nat'l Ins. Co. v. Adm'rs,* 2 F.3d 192, 196 (7th Cir.1993) (holding that "subsequent statements negating any defamatory implications may show the absence of malice by demonstrating that the speaker did not contemplate the defamatory reading in the first place"); *Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066, 1071 (5th Cir.1987) (noting that "[r]efusal to retract an exposed error tends to support a finding of actual malice [and][c]onversely, a

readiness to retract tends to negate 'actual malice' ") (citations omitted); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600, 605 (D.D.C.1977) ("[I]t is significant and tends to negate any inference of actual malice on the part of the [publisher] that it published a retraction ... in the next day's edition ...."), *aff'd*, 578 F.2d 442 (D.C.Cir.1978); *see also* SACK ON DEFAMATION § 11.1; John C. Martin, *The Role of Retraction in Defamation Suits*, 1993 U. OF CHI. LEGAL F. 293, 296 (1993) (noting that some courts "regard retraction as sufficiently probative of an absence of malice to warrant summary judgment in suits involving public figures").

[22] The *Buzz* column was certainly crude and provocative, but the First Amendment does not police bad taste. [FN10] ***167** *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *see also Sullivan*, 376 U.S. at 270, 84 S.Ct. 710 ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on public figures.); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 301, 307 (N.Y.App.Div.1965) ("[W]e may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involved in this litigation are not artistic or literary works.... Whether [the work] is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases.").

FN10. As one commentator has aptly noted:

To ask a satirist to be in good taste is like asking a love poet to be less personal. Is THE SATYRICON in good taste? Is A MODEST PROPOSAL? Swift recommends the stewing, roasting and fricaseeing of one-year-old children.... How nasty and vulgar that must have seemed.... Imagine how
this went down in polite society: 'A child will make two dishes at an Entertainment for Friends; and when the Family dines alone, the fore or hind quarter will make a reasonable Dish, and seasoned with a little Pepper or Salt will be very good Boiled on the fourth Day, especially in Winter....' Now that's considered Literature. It's called Swiftian. Back in 1729 it probably seemed, to a lot of Smith's contemporaries, bad taste and worse.

PHILIP ROTH, READING MYSELF AND OTHERS 47 (1975) (Quoting JONATHAN SWIFT, A MODEST PROPOSAL (1729)).

Elected public officials, like **Isaacks** and **Whitten**, must become enured to the slings and arrows of public life. *See* *Sullivan*, 376 U.S. at 272-73, 84 S.Ct. 710 ("[J]udges are to be treated as men of fortitude, able to thrive in a hardy climate."); *Patrick*, 27 Cal.Rptr.2d at 889 ("As judges we are public figures, and part of our job, to paraphrase Harry Truman, is to stand the heat in the kitchen."); *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 216 Cal.Rptr. 252, 258 (1985) ("[I]f judges assumed the responsibility to decide what is amusing and made the protections of the First Amendment turn upon their views, perhaps less putative humor would be safeguarded than our restrained approach permits."). We should not "deny to the press the right to use hyperbole, under the threat of

removing the protective mantle of *New York Times,* [thereby] condemn[ing] the press to an arid, desiccated recital of bare facts." *Time, Inc. v. Johnston,* 448 F.2d 378, 384 (4th Cir.1971); *see also Berlin v. E.C. Publications, Inc.,* 329 F.2d 541, 545 (2d Cir.1964)(noting, with respect to an alleged copyright infringement, "... as a general proposition, we believe that parody and satire *are* deserving of substantial freedom--both as entertainment and as a form of social and literary criticism"), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964). Moreover, the court of appeals noted--correctly--that Farley "never intended a straight news story. She never interviewed **Isaacks** and **Whitten** and admitted quotes attributed to them were untrue. She denied the story was false, but admitted it was 'fictional.' " 91 S.W.3d at 863. If indeed these undisputed facts are treated as evidence of actual malice, however, there would be automatic actual malice in all cases of satire. As set forth above, this cannot be reconciled with the First Amendment as interpreted by *Falwell.*

The court of appeals' reliance on New Times's failure to conduct an independent investigation of the Beamon case is particularly misguided. *See* 91 S.W.3d at 863, 864 (noting that Farley "did no investigation into the handling of the Beamon case" and that "Lyons, who was responsible for the Dallas Observer's overall editorial policy, agreed that no one investigated the Beamon incident"). New Times's portrayal of the Beamon incident is not at issue in this case and, even if it were, failure to investigate, by itself, is no evidence of actual malice. *Bentley,* 94 S.W.3d at 595.

***168** [23] Finally, in finding a fact issue on actual malice, the court of appeals relied "[m]ost significantly" on Julie Lyons's testimony that, after the article was

published, she agreed that even intelligent, well-read people could have been misled by the story. 91 S.W.3d at 864. The actual malice inquiry focuses on the defendant's state of mind at the time of publication, however. *See Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 173 (Tex.2003) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). When asked what she thought at the time of publication, Lyons answered that she did not know or suspect *at that time* that the satire would be misinterpreted. Her hindsight acknowledgment that some people could have been fooled is not evidence that the reasonable reader could have understood the satire to state actual facts, nor is it evidence of actual malice at the time of publication.

We hold that New Times negated actual malice as a matter of law. In light of our disposition of this issue, we do not reach the *Observer's* request that we revisit our holding in *Huckabee* to require clear and convincing evidence of actual malice at the summary judgment stage.

IV

Attorney's Fees and Costs

Section 51.015, Tex. Civ. Prac. & Rem.Code provides:

Costs of Appeal

In the case of an appeal brought pursuant to Section 51.014(6), if the order appealed from is affirmed, the court of appeals shall order the appellant to pay all costs and reasonable attorney fees of the appeal; otherwise each party shall be liable for and taxed its own costs of the appeal.

Tex. Civ. Prac. & Rem.Code § 15.015. Because it affirmed the trial court's order, the court of appeals ordered New Times to pay all costs and reasonable attorney's fees for the appeal. 91 S.W.3d at 864. Because we reverse that part of the court of appeal's judgment affirming the trial court

order, we also reverse the court of appeals' judgment requiring New Times to pay attorney's fees and costs. Instead, pursuant to the statute, each party shall be liable for and taxed its own costs.

V

Conclusion

"However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting *Gertz*, 418 U.S. at 339-40, 94 S.Ct. 2997). As Judge Learned Hand noted, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943), quoted in *N.Y. Times*, 376 U.S. at 270, 84 S.Ct. 710. We reverse the court of appeals' judgment and render judgment that **Isaacks** and **Whitten** take nothing.

Justice SCHNEIDER did not participate in the decision.

APPENDIX

***169**

APPENDIX NO. 2

THE SUPREME COURT OF TEXAS

Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

November 05, 2004

Mr. James Alan Hemphill
Graves Dougherty Hearon & Moody, P C.
401 Congress Ave., Suite 2200
Austin, TX 78701

Mr. Michael J. Whitten
The Whitten Law Firm, PC
218 North Elm Street
Denton, TX 76201-4108

RE: Case Number: 03-0019
Court of Appeals Number: 02-01-00023-CV
Trial Court Number: 99,20910-158

Style: NEW TIMES, INC., D/B/A DALLAS OBSERVER, DALLAS OBSERVER, L.P., ROSE FARLEY, JULIE LYONS, AND PATRICK WILLIAMS
V.
BRUCE ISAACKS AND DARLENE A WHITTEN

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause

Sincerely,
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Tracy Kunkel
Ms. Stephanie Lavake

THE SUPREME COURT OF TEXAS

Orders Pronounced November 5, 2004

ORDERS ON CAUSES

02-0902 GARLAND COMMUNITY HOSPITAL v.. DEBI ROSE; from Dallas County; 5th district (05-01-01813-cV, 87 SW3d 188, 08-20-02)

The *Court* reverses the court of appeals' judgment and remands the case to that court.

Chief Justice Jefferson delivered the opinion of the Court

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

01-0346 PPG INDUSTRIES, INC. v. JMB/HOUSTON CENTERS PARTNERS LIMITED PARTNERSHIP; from Harris County; 14th district (14-98-00154-CV, 41 SW3d 270, 03-08-01)

(Chief Justice Jefferson not sitting)

02-0069 TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY v. JEFF A. STURROCK; from Jasper County; 9th district (09-01-00089-CV, 65 SW3d 763, 12-06-01)

02-1009 TOM ALEXANDER, INDIVIDUALLY, AND ALEXANDER & MCEVILY v. TURTUR & ASSOCIATES, INC., MARIO TURTUR, STEVE TURTUR, AND TURTUR & ASSOCIATES; from Harris County; 1st district
(01-96-01595-CV, 86 SW3d 646, 10-31-01)

(Justice Owen not sitting)

03-0019 NEW TIMES. INC. D/B/A DALLAS OBSERVER, DALLAS OBSERVER, L.P., ROSE FARLEY, JULIE LYONS, AND PATRICK WILLIAMS v. BRUCE ISAACKS AND DARLENE A WHITTEN; from Denton County; 2nd district
(02-01-00023-CV, 91 SWI4 844, 11-21-02)

APPENDIX NO. 3

91 S.W.3d 844, 31 Media L. Rep. 2113
Court of Appeals of Texas,
Fort Worth.
NEW TIMES, INC. d/b/a Dallas Observer; Dallas Observer, L.P.; Rose Farley, Julie Lyons, and Patrick Williams, Appellants.
v.
Bruce **ISAACKS** and Darlene A. **Whitten,** Appellees.
Nos. 02-01-023-CV, 02-01-216-CV.
Nov. 21, 2002.

District attorney and judge brought action against local newspaper for defamation. The 158th District Court, Denton County, Bob McCoy, J., denied newspaper's motions for summary judgment. Newspaper appealed. On rehearing, the Court of Appeals, Anne Gardner, J., held that: (1) satire or parody that conveyed a substantially false and defamatory impression was not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead was subject to scrutiny as to whether it made a statement of fact under defamation case law; (2) genuine issue of material fact existed as to whether newspaper article provided any degree of notice to reasonable reader that article was satire or parody and whether reasonable reader could have concluded that article made statements of fact; (3) traditional test for actual malice applied to defamation cases involving asserted parody or satire; (4) genuine issue of material fact existed as to whether newspaper article was published with actual malice; and (5) newspaper was required to pay attorney fees and costs of the appeal.
Affirmed.

West Headnotes

[1] KeyCite Notes

⇦30 Appeal and Error
⇦30XVI Review
⇦30XVI(A) Scope, Standards, and Extent, in General
⇦30k862 Extent of Review Dependent on Nature of Decision Appealed from
⇦30k863 k. In General. Most Cited Cases

Summary judgment standards of review in public official or public figure defamation cases are the same as in other cases.

[2] KeyCite Notes

⇦228 Judgment
⇦228V On Motion or Summary Proceeding
⇦228k182 Motion or Other Application
⇦228k183 k. In General. Most Cited Cases

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense; motion must specifically state the elements for which there is no evidence. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(i).

[3] KeyCite Notes

⇦228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Trial court must grant motion for no-evidence summary judgment unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(i).

[4] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

228 Judgment KeyCite Notes
228V On Motion or Summary Proceeding
228k190 k. Construction and Operation. Most Cited Cases

No-evidence summary judgment is essentially a pretrial directed verdict, and Court of Appeals applies the same legal sufficiency standard in reviewing a no-evidence summary judgment as it applies in reviewing a directed verdict.

[5] KeyCite Notes

⇐30 Appeal and Error
⇐30XVI Review
⇐30XVI(G) Presumptions
⇐30k934 Judgment
⇐30k934(1) k. In General. Most Cited Cases
(Formerly 30k394(1))

Court of Appeals reviews the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences.

[6] KeyCite Notes

⇐228 Judgment
⇐228V On Motion or Summary Proceeding
⇐228k182 Motion or Other Application
⇐228k185 Evidence in General
⇐228k185(5) k. Weight and Sufficiency. Most Cited Cases

If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper.

[7] KeyCite Notes

⇐92 Constitutional Law
⇐92V Personal, Civil and Political Rights
⇐92k90 Freedom of Speech and of the Press
⇐92k90.1 Particular Expressions and Limitations
⇐92k90.1(5) k. Libel and Slander; False Reports.

Most Cited Cases

Tort of defamation creates an exception to broad constitutional free speech guarantees. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[8] KeyCite Notes

⇐237 Libel and Slander
⇐237I Words and Acts Actionable, and Liability Therefor
⇐237k1 k. Nature and Elements of Defamation in General. Most Cited Cases

Legitimate state interest underlying the law of defamation is the compensation of individuals for the harm inflicted on them by defamatory falsehood.

[9] KeyCite Notes

⇐92 Constitutional Law
⇐92V Personal, Civil and Political Rights
⇐92k90 Freedom of Speech and of the Press
⇐92k90.1 Particular Expressions and Limitations
⇐92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Defamatory expression is not actionable under the First Amendment unless the statement is one of false fact. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

⇐237 Libel and Slander
⇐237II Privileged Communications, and Malice Therein
⇐237k48 Criticism and Comment on Public Matters; Public Figures
⇐237k48(2) k. Character and Conduct of Public Officers and Employees. Most Cited Cases

To recover for defamation, public officials must establish that the defendant's publication of a false and defamatory statement was made with actual malice.

[11] KeyCite Notes

⇐92 Constitutional Law
⇐92V Personal, Civil and Political Rights
⇐92k90 Freedom of Speech and of the Press
⇐92k90.1 Particular Expressions and Limitations
⇐92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Constitutional requirement of "falsity" for defamation suit depends upon the meaning a reasonable person would attribute to a publication, and not on a technical analysis of each individual statement. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[12] KeyCite Notes

⇐237 Libel and Slander
⇐237I Words and Acts Actionable, and Liability Therefor
⇐237k19 k. Construction of Language Used. Most

Cited Cases

Whether a publication makes a statement of fact that is false and defamatory depends upon a reasonable person's perception of the entirety of the publication, not merely on individual statements.

[13] KeyCite Notes

⇦237 Libel and Slander
⇦237IV Actions
⇦237IV(E) Trial, Judgment, and Review
⇦237k123 Questions for Jury
⇦237k123(2) k. Construction of Defamatory Language in General. Most Cited Cases

Whether words used are reasonably capable of defamatory meaning is initially a question of law for the trial court.

[14] KeyCite Notes

⇦237 Libel and Slander
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k19 k. Construction of Language Used. Most Cited Cases

When determining whether words used are reasonably capable of defamatory meaning, the court must construe the allegedly defamatory publication as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

[15] KeyCite Notes

⇦237 Libel and Slander
⇦237IV Actions
⇦237IV(E) Trial, Judgment, and Review
⇦237k123 Questions for Jury
⇦237k123(2) k. Construction of Defamatory Language in General. Most Cited Cases

When a publication is of ambiguous or doubtful import, the jury in defamation suit must determine its meaning.

[16] KeyCite Notes

⇦237 Libel and Slander
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k6 Actionable Words in General
⇦237k6(1) k. In General. Most Cited Cases

In determining whether a statement is defamatory, first inquiry is whether the article conveys false statements of fact.

[17] KeyCite Notes

⇦237 Libel and Slander
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k19 k. Construction of Language Used. Most Cited Cases

Meaning of a publication, and thus whether it is false and defamatory, depends upon a reasonable person's perception of the publication.

[18] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Statements of opinion or rhetorical hyperbole are protected from giving rise to liability for defamation by the First Amendment if a reasonable reader would understand that they do not state an actual fact. U.S.C.A. Const.Amend. 1.

[19] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k20 Certainty
237k22 k. Matter Imputed. Most Cited Cases

Publication may, by omission or juxtaposition, connote false facts giving rise to liability for defamation even though publication does not state them directly..

[20] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead is subject to scrutiny as to whether it makes a statement of fact under defamation case law. U.S.C.A. Const.Amend. 1.

[21] KeyCite Notes

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.25 Particular Cases
115k57.25(3) k. Media and Publications. Most Cited Cases
(Formerly 115k50.10)

Public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing in addition to the outrageous nature of the publication that the publication contains a false statement of fact; same standard applies for determining whether a

parody or satire constitutes protected speech as for determining whether any other type of statement is actionable under the First Amendment. U.S.C.A. Const.Amend. 1.

[22] KeyCite Notes

⇦237 Libel and Slander
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k6 Actionable Words in General
⇦237k6(1) k. In General. Most Cited Cases

If an attempted satire or parody fails to make clear to its readers that it is not conveying actual facts, it may be defamatory.

[23] KeyCite Notes

⇦237 Libel and Slander
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k10 Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment
⇦237k10(3) k. Executive Officers and Employees. Most Cited Cases

⇦237 Libel and Slander KeyCite Notes
⇦237I Words and Acts Actionable, and Liability Therefor
⇦237k10 Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment

⇐237k10(4) k. Judicial Officers. Most Cited Cases

Reasonable reader of allegedly defamatory newspaper article could conclude that fictionalized quotes attributed to a bailiff, presiding judge, district attorney, former governor, and a representative of American Civil Liberties Union, attributing to them the detention of a fictional first-grade student on possible delinquency charges of making a terroristic threat in a book report, were real, rather than satire, where these were appropriate people to comment on issue of school violence.

[24] KeyCite Notes

⇐228 Judgment
⇐228V On Motion or Summary Proceeding
⇐228k181 Grounds for Summary Judgment
⇐228k181(15) Particular Cases
⇐228k181(33) k. Tort Cases in General. Most Cited Cases

Genuine issues of material fact existed as to whether satirical newspaper article provided any degree of notice to reasonable reader that article was satire or parody and whether reasonable reader could have concluded that article made statements of fact, precluding summary judgment in defamation action brought by judge and district attorney against newspaper.

[25] KeyCite Notes

⇐237 Libel and Slander
⇐237II Privileged Communications, and Malice Therein

⇦237k51 Existence and Effect of Malice
⇦237k51(1) k. In General. Most Cited Cases

In the defamation context, "actual malice" is a term of art; it does not include ill-will, spite, or evil motive.

[26] KeyCite Notes

⇦237 Libel and Slander
⇦237II Privileged Communications, and Malice Therein
⇦237k51 Existence and Effect of Malice
⇦237k51(1) k. In General. Most Cited Cases

"Actual malice" is the making of an allegedly defamatory statement with knowledge that it is false or with reckless disregard as to its truth.

[27] KeyCite Notes

⇦237 Libel and Slander
⇦237II Privileged Communications, and Malice Therein
⇦237k51 Existence and Effect of Malice
⇦237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

To establish reckless disregard for defamation purposes, a public official or public figure must show that the publisher entertained serious doubts as to the truth of its publication.

[28] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

Public official or figure may hold a speaker liable for damaging his reputation through publication of a defamatory falsehood only if that statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

[29] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k48 Criticism and Comment on Public Matters; Public Figures
237k48(2) k. Character and Conduct of Public Officers and Employees. Most Cited Cases

Rationale behind requirement for defamation that public official show actual malice is that false statements of fact about these figures have no constitutional value. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[30] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k48 Criticism and Comment on Public Matters; Public Figures
237k48(1) k. In General. Most Cited Cases

Despite the lack of protection afforded defamatory falsehoods, they are unavoidable in public debate, and to impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[31] KeyCite Notes

⇦237 Libel and Slander
⇦237II Privileged Communications, and Malice Therein
⇦237k51 Existence and Effect of Malice
⇦237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

Traditional test for actual malice, requiring evidence that defendant knew or strongly suspected that the publication as a whole could present a false and defamatory impression of events, is both adequate and appropriate for asserted satire or parody in a defamation action by public officials.

[32] KeyCite Notes

⇦237 Libel and Slander
⇦237II Privileged Communications, and Malice Therein
⇦237k51 Existence and Effect of Malice
⇦237k51(1) k. In General. Most Cited Cases

Constitutional test for "actual malice" is a subjective test that examines the author's state of mind regarding whether he or she knew a statement was false or made with reckless

disregard for its truth. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

[33] KeyCite Notes

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

To establish "actual malice," a public figure must only present evidence that the defendant knew or strongly suspected that the publication as a whole could present a false and defamatory impression of events.

[34] KeyCite Notes

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases

Because public officials must prove actual malice in order to prevail on defamation claim, defendant is entitled to summary judgment as to any statement on which it can negate actual malice as a matter of law.

[35] KeyCite Notes

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency. Most Cited Cases

Conclusory statements by interested witnesses are insufficient to support summary judgment.

[36] KeyCite Notes

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency. Most Cited Cases

Summary judgment based on uncontroverted testimonial evidence of an interested witness will be granted only if the evidence is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

[37] KeyCite Notes

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited

Cases

Genuine issue of material fact existed as to whether newspaper knew or strongly suspected that article, meant to be a satire, could be misleading to average reader, precluding summary judgment in defamation action by judge and district attorney against newspaper.

[38] KeyCite Notes

237 Libel and Slander
237IV Actions
237IV(E) Trial, Judgment, and Review
237k129 k. Costs. Most Cited Cases

Court of Appeals was required by statute to order newspaper to pay costs and reasonable attorney fees incurred by judge and district attorney, on newspaper's interlocutory appeal from trial court's denial of newspaper's First Amendment-based motions for summary judgment in defamation action, where Court of Appeals affirmed trial court's denial of summary judgment. U.S.C.A. Const.Amend. 1; V.T.C.A., Civil Practice & Remedies Code § 51.015.

[39] KeyCite Notes

102 Costs
102X On Appeal or Error
102k226 k. Appeal from Interlocutory Judgments or from Orders. Most Cited Cases

The terms of statute providing for an award of costs on

interlocutory appeal, upon affirmance of the denial of a motion for summary judgment predicated on First Amendment claim by news media, are mandatory. U.S.C.A. Const.Amend. 1; V.T.C.A., Civil Practice & Remedies Code § 51.015.

*848 George & Donaldson, L.L.P., James A. Hemphill, Austin, Law Office of Steven P. Suskin, Steven P. Suskin, Phoenix, AZ, for Appellants.

Griffin, Whitten, Jones & Reib, Michael J. Whitten, Denton, for Appellee.

PANEL B: CAYCE, C.J.; GARDNER and WALKER, JJ.

OPINION ON REHEARING

ANNE GARDNER, Justice.

Appellants, New Times, Inc., d/b/a *Dallas Observer*, Dallas Observer, L.P., Rose Farley, Julie Lyons, and Patrick Williams have filed a motion for rehearing regarding our original decision. We withdraw our opinion and judgment issued May 2, 2002, and substitute the following in their place. We overrule the motion for rehearing.

I. INTRODUCTION

In this interlocutory appeal, we must decide two issues: whether an article defended as parody or satire regarding a public official or figure is mere opinion or rhetorical hyperbole and is, therefore, protected *849 First Amendment speech; and what is the proper application of the "actual malice" standard to asserted satire or parody in a defamation action by public officials. Appellees Bruce Isaacks, Criminal District Attorney for Denton County, and Judge Darlene A. Whitten, Judge of the Denton County Court at Law Number One, sued the *Dallas Observer* for defamation arising from an article published by that

weekly publication, attributing to them the detention of a fictional first-grade student on possible delinquency charges of making a terroristic threat in a book report. Appellants New Times, Inc., d/b/a *Dallas Observer,* Dallas Observer, L.P., Rose Farley, Julie Lyons, and Patrick Williams (collectively "*Dallas Observer* ") complain of the trial court's denial of their traditional and no-evidence motions for summary judgment, contending that the article was published as a satire and without actual malice as required for recovery of defamation by a public official. [FN1] We hold that a genuine issue of material fact exists as to whether a reasonable person could construe the asserted parody or satire as a statement of actual fact. We further hold that the test for actual malice adopted by the Supreme Court in *New York Times, Co. v. Sullivan* [FN2] applies to claimed satire or parody, and that the *Dallas Observer* has failed to establish lack of actual malice as a matter of law. We affirm the trial court's order denying the *Dallas Observer's* motions for summary judgment.

FN1. Tex. Civ. Prac. & Rem.Code § 51.014(6) (Vernon Supp.2003) (allowing interlocutory appeal from order denying motion for
summary judgment based upon claim or defense arising under the First Amendment of the United States Constitution or article 1, section 8 of the Texas Constitution).

FN2. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

II. FACTUAL BACKGROUND

On October 28, 1999, thirteen-year-old Christopher Beamon, a seventh-grader in Ponder, Texas, was ordered detained by Judge Whitten, who was then judge of the

Denton County's juvenile court, after he wrote a graphic Halloween horror story depicting the shooting death of a teacher and two fellow students. He was released after being held for five days at the juvenile facility while the Denton County District Attorney's office considered delinquency charges. The case received considerable publicity, not only in the North Texas area, but also nationally. [FN3]

FN3. The Beamon incident occurred approximately six months after high school students Eric Harris and Dylan Klebold killed twelve students and a teacher before taking their own lives on April 20, 1999 at Columbine High School in Colorado. *Tragedy in Colorado,* USA TODAY, <*http:// www.usatoday.com/news/index/colo/colo156.htm*> (last visited Nov. 20, 2002).

As described on its website, the *Dallas Observer* is an alternative newsweekly, "known for its hard-edged investigative stories about government, politics and business, as well as its pointed, provocative coverage of sports, music and the arts." *Publication Profiles,* DALLAS OBSERVER, <*http:// www.newtimes.com/profiles_dal.html*> (last visited Nov. 20, 2002). On November 11, 1999, the *Dallas Observer* published an article in both its hard copy and on-line edition of its weekly newspaper in the section labeled "News," reporting that "[i]n the second homework-related arrest in as many weeks, a Denton County juvenile court judge [Whitten] jailed a Ponder student for suspicion of making a terroristic threat...."
The November 11th article, authored by staff-writer Rose Farley, was entitled ***850** "Stop the Madness." The article reported that Cindy Bradley, "a diminutive 6-year oid,"

was arrested during "story-time" in her class at Ponder Elementary School for a book report she had written about an award-winning children's classic, *Where the Wild Things Are,* by Maurice Sendak. According to the article, Judge Whitten ordered Cindy detained for ten days at the Denton County Juvenile Detention Center while prosecutors decided whether to file charges.

The *Dallas Observer* article described Cindy as appearing subdued when she stood before Judge Whitten "dressed in blue jeans, a Pokemon T-shirt, handcuffs and ankle shackles." Judge Whitten was quoted as chastising Cindy from the bench:

"Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction," Whitten said from the bench. "It's time for you to grow up, young lady, and it's time for us to stop treating kids like children."

The article further related that Denton County District Attorney Bruce Isaacks stated that he had not decided whether to prosecute Cindy. Isaacks was quoted as stating, "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits." The article also reported sources as saying that courthouse security officers ordered shackles for Cindy after they reviewed her school record, which included "reprimands for spraying a boy with pineapple juice and sitting on her feet." A bailiff was also quoted as stating in the article, "It's not easy finding cuffs that small. Fortunately, we ordered a special set last week after that other kid was busted." The article then went on to explain the incident involving Christopher Beamon.

It is undisputed that, aside from references to Christopher Beamon's detention, the "Stop the Madness" article was completely made up. It was conceived and authored by Farley and ultimately published after input, editing, and

approval by Williams, the managing editor for the paper, and Lyons, its editor in chief. Included with the article was a photograph of a six-year-old girl, identified as Cindy Bradley, who was actually the daughter of a *Dallas Observer* staff member.

After publication of the Madness article, complaints about **Isaacks** and **Whitten** were received and posted on the paper's website, accusing those officials of incompetency and calling for their dismissal from office based on their conduct as described in the article. Readers and other news media contacted **Isaacks** and **Whitten** directly, expressi ng anger and criticism of the described conduct in the article as being "sickening" and "stupid," insisting that Judge Whitten be removed from the bench, and urging that both should be "ashamed" of their conduct.

Isaacks and **Whitten** requested a retraction by the *Dallas Observer.* The *Dallas Observer* responded, explaining in its "Buzz" column of the next weekly edition that the Madness article was a satire, but describing readers who believed the report as "cerebrally challenged" and "clueless."

III. PROCEDURAL BACKGROUND

Isaacks and **Whitten** filed suit for defamation, alleging that the article could be understood by the reasonable reader as making false statements of fact about them and that the statements were made with actual malice. They alleged that the article was libel *per se* because it accused them of conduct amounting to official oppression, false arrest, false imprisonment, civil rights violations, child abuse, and assault. ***851** The *Dallas Observer* moved twice for summary judgment.

In its first motion for summary judgment, the *Dallas Observer* contended that, as a matter of law, the article was fictional satire or parody and that the *Dallas Observer* had not acted with the actual malice necessary for public

official defamation. The *Dallas Observer* also sought a no-evidence summary judgment based on no evidence of actual malice. The trial court ruled that a genuine issue of material fact existed as to whether a reasonable reader would understand the article at issue was satire or parody. The court also denied the *Dallas Observer's* traditional motion for summary judgment based on lack of actual malice, ruling that **Whittem**nd **Isaacks** were entitled to additional discovery on that element. For the same reason, the trial court also denied the *Dallas Observer's* no-evidence motion for summary judgment as to actual malice. The *Dallas Observer* later filed a second traditional and no-evidence motion for summary judgment confined to the actual malice issue, which the trial court also denied.

IV. ISSUES ON APPEAL

In its first issue, the *Dallas Observer* generally complains that the trial court erred by denying both its traditional and no-evidence motions for summary judgment. In its second issue, the *Dallas Observer* contends that it was entitled to summary judgment because, as a matter of law, a reasonable reader would understand that the article, in context, was a satire or parody and did not purport to make statements of actual fact about Appellees. Thirdly, the *Dallas Observer* contends that it was entitled to a no-evidence summary judgment because Appellees could produce no evidence raising a genuine issue of material fact that the *Dallas Observer* acted with actual malice, an essential element in a public official defamation case. Finally, the *Dallas Observer* argues that it was entitled to traditional summary judgment because it conclusively disproved actual malice.

V. STANDARDS OF REVIEW

A. Standards for Summary Judgment

[1] The summary judgment standards of review in

public official or public figure cases are the same as in other cases. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 423 (Tex.2000) (declining to adopt the "clear and convincing" standard at the summary judgment stage of a public figure case). Whether an order grants or denies a motion for summary judgment, we apply the same *de novo* standard of review on appeal. *Gaylord Broad. Co. v. Francis*, 7 S.W.3d 279, 283 (Tex.App.-Dallas 1999, pet. denied).

1. Traditional Summary Judgment

In a summary judgment case, the issue on appeal is whether the movant met the summary judgment burden of establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex.R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex.1999); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex.1996); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex.1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.*, 391 S.W.2d at 47.

***852** A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex.1999). Once the defendant-movant presents summary judgment evidence that negates an element of the plaintiff's claim, the burden shifts to the plaintiff to put on competent controverting evidence that

proves the existence of a genuine issue of material fact with regard to the element challenged by the defendant. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex.1995).

2. No-Evidence Summary Judgment

[2] [3] After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex.R. Civ. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 497-98 (Tex.App.-Texarkana 1998, orig. proceeding). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. Tex.R. Civ. P. 166a(i) cmt.; *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex.App.-Austin 1998, no pet.).

[4] [5] [6] A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex.App.-Fort Worth 1999, pet. denied); *Moore*, 981 S.W.2d at 269. We review the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex.1994). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Moore*, 981 S.W.2d at 269.

VI. POLITICAL SATIRE AND PARODY: ARE THEY PROTECTED BY THE FIRST AMENDMENT?

The *Dallas Observer* first contends that the trial court erred in failing to grant its motions for summary judgment because a reasonable reader would understand the "Stop the Madness" article as satire or parody, not as making statements of actual fact, and that, as such, the article is protected speech as a matter of law. The *Dallas Observer* does not contend that parody or satire is *per se* protected speech; rather, it contends that the article is protected because it amounts to opinion or rhetorical hyperbole rather than statements of fact. Whether an article is parody or satire regarding a public official or public figure and, therefore, is protected First Amendment speech, is a question of first impression for Texas courts. [FN4]

FN4. Two Texas courts have addressed the issue of sarcasm, but no Texas court has addressed the categorization of parody/satire or its role in First Amendment speech. *See, e.g.*, *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 655 (Tex.1987) (addressing specific language in an unsolicited letter to a potential client and noting that it was "sarcastic and may perhaps be twisted ... to imply Musser was unethical," but concluding statement was not untrue and was not defamatory); *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215, 223 (Tex.App.-Amarillo 1997, pet. denied) (noting distinction between torts of libel and business disparagement and addressing defendant's claim that statements made were meant to be sarcastic).

*853 A. Free Speech and Defamation

[7] [8] The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Likewise, article I, section 8 of the Texas Constitution states, "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." TEX. CONST. art. I, § 8. The tort of defamation creates an exception to these broad guarantees. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974); *see also Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex.1994) (noting that "[e]very defamation action that the law permits necessarily inhibits free speech"). "The legitimate state interest underlying the law of [defamation] is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341, 94 S.Ct. at 3008. The tension between allowing free political speech and protecting public officials and figures from defamation has particular importance in this case as it is undisputed that both **Isaacks** and **Whitten** are public officials and were the targets of the *Dallas Observer*'s article.

[9] [10] Libel is a defamatory statement expressed in written or other graphic form tending to injure one's reputation, thereby exposing the person to public hatred, contempt, ridicule, or financial injury. Tex. Civ. Prac. & Rem.Code Ann. § 73.001 (Vernon 1997). Despite this broad definition, a defamatory expression is not actionable under the First Amendment unless the statement is one of false fact. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69, 106 S.Ct. 1558, 1559, 89 L.Ed.2d 783 (1986); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-20,

110 S.Ct. 2695, 2705-06, 111 L.Ed.2d 1 (1990) (holding falsity must be based upon whether the statement carries a "provably false factual connotation"). Likewise, Texas courts have recognized that, under the First Amendment, public officials and public figures must prove, as an essential element of defamation that a publication makes a false statement of fact. *See Musser,* 723 S.W.2d at 655 (noting that, in order to prove defamation, public figures and officials must initially prove the publication makes a false statement of fact); *Fort Worth Star-Telegram v. Street,* 61 S.W.3d 704, 709 (Tex.App.-Fort Worth 2001, no pet.) (same); *Brewer v. Capital Cities/ABC, Inc.,* 986 S.W.2d 636, 642 (Tex.App.-Fort Worth 1998, no pet.) (same). To recover for defamation, public officials such as **Isaacks** and **Whitten** must also establish that the defendant's publication of a false and defamatory statement was made with actual malice. *Huckabee,* 19 S.W.3d at 420; *WFAA-TV, Inc. v. McLemore,* 978 S.W.2d 568, 571 (Tex.1998), *cert. denied,* 526 U.S. 1051, 119 S.Ct. 1358, 143 L.Ed.2d 519 (1999); *Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989).

[11] [12] Falsity "for constitutional purposes [depends upon] the meaning a reasonable person would attribute to a publication, and not on a technical analysis of each individual statement." *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 116 (Tex.2000). Whether a publication makes a statement of fact that is false and defamatory depends upon a reasonable person's perception of the entirety of the publication, ***854** not merely on individual statements. *Milkovich,* 497 U.S. at 18, 110 S.Ct. at 2695 (holding that what plaintiff must prove false is not literal phrase but "what a reasonable reader would have understood the author to have said"); *Bentley v. Bunton,* 45 Tex. Sup.Ct. J. 1172, 1182, 94 S.W.3d 561, 579 (2002),

Turner, 38 S.W.3d at 116; *see also* *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511, 111 S.Ct. 2419, 2430, 115 L.Ed.2d 447 (1991) (noting that a quotation, taken out of context, can "distort" meaning).

[13] [14] [15] Whether words used are reasonably capable of defamatory meaning is initially a question of law for the trial court. *Bentley*, 45 Tex. Sup Ct. J. at 1182, and n. 44, 94 S.W.3d at 561, and n. 44; *Turner*, 38 S.W.3d at 114; *Musser*, 723 S.W.2d at 655. The court must construe the allegedly defamatory publication as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *Turner*, 38 S.W.3d at 114; *Musser*, 723 S.W.2d at 655; *accord* *Milkovich*, 497 U.S. at 24, 110 S.Ct. at 2709 (Brennan, J., dissenting) (noting factors relied upon by majority to distinguish fact from opinion were same as those of lower courts: type of language used, meaning of statement in context, whether statement is verifiable, and broader social circumstances in which it is made). When a publication is of ambiguous or doubtful import the jury must determine its meaning. *Turner*, 38 S.W.3d at 114; *Musser*, 723 S.W.2d at 655.

B. Satire and Parody

Satire, particularly realistic satire, is defined as a distortion of the familiar with the pretense of reality in order to convey an underlying critical message. *See* Leslie Kim Treiger, Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilge*, 98 YALE L.J. 1215, 1219 (1989) (noting lack of protection under case law for "realistic satire" based on the *New York Times* actual malice test). "Satire ... can be identified ... by the methods it employs; whether in the form of irony, sarcasm or parody, it is usually humorous, and uses shocking and cruel language." *Id.* at 1230-31 (citing G.

HIGHET, THE ANATOMY OF SATIRE 5 (1962)). By its very nature, satire employs the use of rhetorical forms in which appearance and reality are in constant flux. *Id.* Parody, a synonym for caricature, is defined as "a form or situation showing imitation that is faithful to a degree but that is weak, ridiculous, or distorted." WEBSTER'S THIRD NEW INT'L DICTIONARY 1643 (Philip Babcock Gove, Ph.D., ed.1981). In the arena of political debate, "Parodies and caricatures are the most penetrating of criticisms." Geri J. Yonover, *Artistic Parody The Precarious Balance: Moral Rights, Parody, and Fair Use,* 14 CARDOZO ARTS & ENT. L.J. 79, 80 (1996) (quoting Aldous Huxley). Despite their sometimes caustic nature, parodies, in the form of cartoons, in particular, have played a prominent role in public and political debate throughout American history. *Hustler Magazine v. Falwell,* 485 U.S. 46, 54, 108 S.Ct. 876, 881, 99 L.Ed.2d 41 (1988). Satire and parody are among the proven and recognized tools utilized by writers to illustrate a political point. Writers often use satire and parody to humble political leaders and public figures. Glenn J. Blumstein, *Nine Characters in Search of an Author: The Supreme Court's Approach to "Falsity" in Defamation and its Implications for Fiction,* 3 UCLA ENT. L.REV. 1, 38 n. 165 (1995). "[By] their nature, satire and caricature are acerbic and 'often calculated to injure the feelings of the subject of the portrayal.' " *James R. Laguzza, Note,* ****855** Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism,* 16 PEPP. L.REV. 97, 107 (1988) (quoting *Hustler,* 485 U.S. at 54, 108 S.Ct. at 881-82). It is wellrecognized that both parody and satire are important components of public debate. *Id.* at 55, 108 S.Ct. at 881.

C. Testing the Publication for Assertions of Fact

[16] In determining whether a statement is defamatory, our first inquiry is whether the article conveys false statements of fact. *Milkovich*, 497 U.S. at 16, 110 S.Ct. at 2704; *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974). If, as the *Dallas Observer* contends, the objected to portions of the article are mere expressions of opinion or rhetorical hyperbole, they are not false statements of fact. [FN5] The United States Supreme Court has held that opinion, rhetorical hyperbole, and other expressions of loose, figurative speech are generally not actionable because they do not state actual facts. *See, e.g., Letter Carriers*, 418 U.S. at 284-86, 94 S.Ct. at 2781-82 (deciding that the use of the word "traitor" in the definition of the word "scab" was not a basis of defamation because the language was loose, figurative, or hyperbolic).

FN5. Rhetorical hyperbole is "extravagant exaggeration employed for rhetorical effect." *Am. Broad. Co. v. Gill*, 6 S.W.3d 19, 30 (Tex.App.- San Antonio 1999, pet. denied).

[17] [18] However, the meaning of a publication, and thus whether it is false and defamatory, depends upon how a person of ordinary intelligence would perceive the publication. *Turner*, 38 S.W.3d at 114; *Musser*, 723 S.W.2d at 655. Statements of opinion or rhetorical hyperbole are protected by the First Amendment if a reasonable reader would understand that they do not state an actual fact. *See, e.g., Hustler*, 485 U.S. at 50, 108 S.Ct. at 879 (holding parody of Jerry Falwell was not believable to the average reader and therefore not actionable defamation); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398

U.S. 6, 14, 90 S.Ct. 1537, 1542, 26 L.Ed.2d 6 (1970) (concluding no reasonable reader would have thought the term "blackmail" used in heated debate was literal accusation of crime); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 80 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.) (following *Bresler* decision and holding use of term "blackmail" was protected by First Amendment as "no more than rhetorical hyperbole").

Texas decisions predating *Milkovich* indicated that all statements of opinion were protected. [FN6] In *Milkovich*, however, the Supreme Court rejected the proposition that the First Amendment protects all statements of opinion concerning matters of public concern. 497 U.S. at 18-20, 110 S.Ct. at 2705-06. Instead, the Court held that falsity for constitutional purposes must be determined by whether a statement carries a "provably false factual connotation." *Id.* The Court specifically recognized the *"Bresler-Letter Carriers-[Hustler]* line of cases" as retaining protection for statements that cannot "reasonably [be] interpreted as stating actual facts." *Id.* at 20, 110 S.Ct. at 2706 (quoting ***856** *Hustler*, 485 U.S. at 50, 108 S.Ct. at 879). This recognition, the court posited, "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.*

FN6. *See, e.g., Carr*, 776 S.W.2d at 570 (stating, "[a]ll assertions of opinion are protected by the [F]irst [A]mendment...."); *Howell v. Hecht*, 821 S.W.2d 627, 631 (Tex.App.-Dallas 1991, writ denied) (same); *Brewer*, 986 S.W.2d at 643 (categorically stating, "an opinion cannot form the basis of a defamation action"); *see also Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 340 (Tex.App.-San Antonio 1988, writ denied) (holding

distinction between opinion and fact elevated to constitutional status), *cert. denied,* 493 U.S. 1021, 110 S.Ct. 722, 107 L.Ed.2d 742 (1990).

In *Turner,* the Supreme Court of Texas not only confirmed the significance of *Milkovich* as limiting the constitutional protection for statements of opinion to those that do not imply false fact, but additionally recognized that, under *Milkovich,* courts must determine falsity for constitutional purposes based upon the meaning a reasonable person would attribute to a publication *as a whole* and not on a technical analysis of each individual statement. 38 S.W.3d at 116. In *Bentley,* a majority of the court further articulated the *Milkovich* analysis as focusing on (1) a statement's verifiability, and (2) the entire context in which it was made. *Bentley,* 45 Tex. Sup.Ct. J. at 1183.
In *Turner,* Sylvester Turner, a mayoral candidate, sued Wayne Dolcefino, a reporter, and KTRK Television for libel. *Turner,* 38 S.W.3d at 109. Dolcefino authored a news report that questioned whether Turner was involved in a multi-million dollar insurance scam in which a person faked their own death. *Id.* at 111. After a jury awarded both actual and punitive damages, the Fourteenth Court of Appeals reversed and rendered. *Id.* The supreme court's focus in *Turner* was on how to address a television news story that made true statements framed in such a manner as to create a misleading impression on the viewer. *Id.* at 113. [FN7]

FN7. The court, while concluding that omissions in the story created a false impression, ultimately held that there was no evidence of actual malice. *Id.* at 121-22.

[19] [20] Analogizing to statements of opinion that may nevertheless become actionable under *Milkovich* if they carry a "provably false factual connotation," the supreme court in *Turner* held that a publication may also, by omission or juxtaposition, "connote false facts even though it does not state them directly." *Id.* at 116. As the *Turner* court noted, a quotation cited out of context may distort meaning even though the speaker used each repeated word. *Id.* In the same way, "failing to place facts in their proper context can change the meaning of an event." *Id.* We believe that the situation in *Turner,* i.e., omission or juxtaposition of true facts so as to create a substantially false impression, is sufficiently analogous that its standard can be adopted here. Thus, the threshold issue here becomes whether the publication, offered as realistic satire or parody, constitutes merely imaginative expression of opinion or rhetorical hyperbole or is so misleading as to convey a substantially false and defamatory impression. We hold that satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead is subject to scrutiny as to whether it makes a statement of fact under defamation case law.

D. Satire and Parody Case Law

Our holding is supported by cases that have addressed defamation claims arising out of satire and parody. The *Dallas Observer* relies on several cases and commentators to support its position that the "Stop the Madness" article is nonactionable opinion or rhetorical hyperbole. Because these cases are factually distinguishable, we are unpersuaded. The *Dallas Observer* initially cites *San Francisco Bay Guardian, Inc. v. Superior Court* as an example of a newspaper parody that did not amount to a statement of actual fact. 17 Cal.App.4th 655, 21 Cal.Rptr.2d

464, 466-67 (Cal.Ct.App.1993). In *Bay Guardian,* ***857*** the newspaper printed a parody in its April Fool's edition in the form of a letter to the editor signed by a fictionalized person. *Id.* at 465. After examining the article in the "totality of circumstances," the court determined that the letter was not defamatory because the average reader would recognize the April Fool's issue as a parody, rather than presenting false facts. *Id.* at 467. The court pointed out that the newspaper informed readers in its table of contents that the April Fool's edition of the paper had a "special parody section." *Id.* at 466. The special parody section was printed on the back of the paper and could only be read when turned upside down. *Id.* For further comedic effect, the *Bay Guardian* had a comment in that section, stating: "Copies of all unsigned letters will be sent to the Federal Bureau of Investigation for cross-checking. In case of accident, we will notify next of kin." *Id.* These were obvious clues to the average reader, absent here, that the letter to the editor in *Bay Guardian* was a parody.

The *Dallas Observer* next turns our attention to *Pring v. Penthouse International,* 695 F.2d 438 (10th Cir.1982). *Pring* arose out of a fictional story in *Penthouse* about the misadventures of "Charlene," a Miss Wyoming at the Miss America contest. *Id.* at 439. In *Pring,* the author described the fictional Ms. Wyoming's talent for both baton twirling and certain oral sexual acts. *Id.* at 441. The court held that "it was readily apparent, with the extended description of thoughts of Charlene and other indications, that [the article] was all fanciful and did not purport to be a factual account." *Id.* The court also noted that "We have impossibility and fantasy within a fanciful story." *Id.* Essentially the court concluded that, because the story could not happen, it could not be taken literally; therefore, any defamatory statements could not reasonably be understood as statements of fact. *Id.* at 443.

In contrast with the article in *Pring,* the "Stop the Madness" article was not of an impossible nature, but came out one week after a minor had actually been arrested for making an alleged terroristic threat in a homework assignment. In light of several years of media attention on violence in public schools, and the correlative facts between the Beamon incident and the "Stop the Madness" story, a reasonable reader could find this story to be believable. Further, the article here was located in the "News" section of the paper and attributed believable quotes to public officials, referred to by their real names, who had been involved in the preceding Beamon incident.

The *Dallas Observer* also attempts to analogize this case to the Ninth Circuit's decision in *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir.1989). Andrea Dworkin, a known feminist vehemently opposed to pornography, was referred to by *Hustler Magazine* repeatedly in a series of graphic sexually explicit cartoons. *Id.* at 1191. The *Dworkin* court held that no reasonable reader would conclude that the caricatures and depictions of Dworkin made actual statements of fact. *Id.* The court reasoned, "[l]udicrous statements are much less insidious and debilitating than falsities that bear the ring of truth." *Id.* at 1194.

In *Dworkin,* readers had clear and distinct clues that the caricatures (drawings) and captioning were not relaying any statement of actual fact. *Id.* Here, the *Dallas Observer* did not utilize a caricature or drawing nor did it attempt to make the article obviously ludicrous. Rather, it utilized the photograph of a little girl to add realism to the article. The *Dallas Observer* provided no obvious clues to the average reader that the article was not conveying statements of actual fact.

*858 [21] Another case relied upon by the *Dallas*

Observer is the Supreme Court case of *Hustler* 485 U.S. at 49, 108 S.Ct. at 878. In *Hustler*, the Supreme Court directly addressed the question of whether a publication labeled a parody constituted rhetorical hyperbole or made an actual statement of fact. In that case, the Court had to determine whether a parody of an advertisement for Compari Liqueur featuring the name and picture of nationally known minister Jerry Falwell constituted actionable defamation or protected parody and therefore presented a question for the jury. *Id.* The fake advertisement involving Falwell had a disclaimer printed at the bottom of the page in small print: "ad parody--not to be taken seriously." *Id.* In *Hustler*, the jury found against Falwell on his libel claim in finding that the *Hustler* parody ad "could not reasonably be understood as describing actual facts ... or ... events" in which Falwell participated. *Id.* The Supreme Court granted certiorari on the issue of whether the "outrageous" nature of the article could serve as the basis for damages for emotional distress. *Id.* at 50, 108 S.Ct. at 879. The Court held, "public figures and public officials may not recover for the tort of intentional infliction of emotional distress ... without showing in addition [to the outrageous nature of the publication] that the publication contains a false statement of fact...." *Id.* at 56, 108 S.Ct. at 882. *Hustler* confirms that the same standard applies for determining whether a parody or satire constitutes protected speech as for determining whether any other type of statement is actionable under the First Amendment. *Id.*

[22] As discussed above, in every case relied upon by the *Dallas Observer* in which a court found parody or satire to be nonactionable, the reader was given obvious

clues that the piece was not conveying statements of actual fact. Because each piece could not be taken literally, the various courts held that the publications were subject to First Amendment protection and were not actionable as defamatory. However, as illustrated above, if an attempted satire or parody fails to make clear to its readers that it is not conveying actual facts, it may be defamatory. Restatement (Second) of Torts § 566, cmt. d, at 176 (1977); *see also Hoppe v. Hearst Corp.*, 53 Wash.App. 668, 770 P.2d 203, 206 (1989) (adopting the Restatement (Second) of Torts section 566).

E. Application of Law to Facts

The *Dallas Observer* maintains that the "Stop the Madness" article provided the average reader ample notice that it was a satire when read in its entirety. To demonstrate its point, the *Dallas Observer* brings several specific sections of the article to our attention. The *Dallas Observer* first addresses the following quote that it attributed to Whitten:

"Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction," Whitten said from the bench. "It's time for you to grow up, young lady, and it's time for us to stop treating kids like children."

The *Dallas Observer* contends that the context of that purported quote obviously brings to the attention of the reader that it was attributed to Judge Whitten in jest and was the very essence of parody. Next, the *Dallas Observer* examines a statement it attributed to Isaacks: " 'We've considered having her certified to stand trial as an adult, but even in Texas there are some limits,' Isaacks said." The *Dallas Observer* insists that the only reasonable interpretation of the statement is that it was a component of fictional satire. The *Dallas Observer* points to other elements of the article as evidence that the ***859** article

clearly signals to the reader that it was satirical in nature:

> Sources say courthouse security officers ordered the shackles after they reviewed [Cindy's] school disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet.
>
> Welch also confirmed reports that school representatives will soon join several local faith-based organizations, including God-Fearing Opponents of Freedom (GOOF), and ask publishers to review the content guidelines for children's books.
>
> "Parents must understand that zero tolerance means just that," [Gov. George W. Bush] said. "We won't tolerate anything."
>
> Cindy scoffed at the suggestion that *Where the Wild Things Are* can corrupt young minds. "Like, I'm sure," she said. "It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

Isaacks and **Whitten** respond that the author's use of quotes throughout the entire article, along with the use of the photograph of the alleged offending child and the fact that the article was in the "News" section with no disclaimer, are indicia from which a reasonable reader would conclude that the article purported to assert statements of actual fact.

[23] **Isaacks** and **Whitten** also point to the article's use of fictionalized quotations attributed to relevant individuals who would likely make some kind of statement in this situation as significantly adding to the realism of the article. The Supreme Court has recognized that "quotations may be a devastating instrument for conveying false meaning." *Masson*, 501 U.S. at 517, 111 S.Ct. at 2433. Here, quotes are attributed to the bailiff, the presiding judge, the district attorney, former Governor George W.

Bush, and a representative of the ACLU. A reasonable reader could conclude that these were the appropriate people to comment on this issue and that their quoted comments were real. Moreover, the use of the photograph and the use of quotes for fictional statements are not the only article is both indexed and published as the lead story under the heading of "News" in a section ordinarily devoted to hard-hitting investigative news. Alongside the article there is a column noting that the article's author had recently won a Katie Award for best general news story, thereby adding credence to her credentials as a news reporter. Additionally, the article interweaves references to an actual incident in which a minor from the same city was detained for a terroristic threat stemming from a homework assignment no less than a week prior to this article's publication. Further, the *Dallas Observer* fails to provide any kind of disclaimer or note to the reader that the article was a parody or satire.

[24] After examining the evidence in the light most favorable to the non-movants, we hold there is evidence raising a genuine issue of material fact that the "Stop the Madness" article fails to provide any notice to a reasonable reader that it was a satire or parody and that a reasonable reader could conclude that the article made statements of fact. Accordingly, the trial court did not err in denying the *Dallas Observer's* motion for summary judgment. The *Dallas Observer* failed to establish as a matter of law that a reasonable person would perceive or understand that the publication did not make false statements of actual fact concerning **Isaacks** and **Whitten.** We overrule the *Dallas Observer's* second issue.

*860 VII. APPLICATION OF ACTUAL MALICE STANDARD TO POLITICAL SATIRE AND PARODY

[25] [26] [27] In its third and fourth issues, the *Dallas Observer* argues that the trial court erred in denying its motions for both traditional and no-evidence summary judgment regarding actual malice. In the defamation context, actual malice is a term of art. It does not include ill-will, spite, or evil motive. *Huckabee*, 19 S.W.3d at 420; *Casso*, 776 S.W.2d at 558; *Street*, 61 S.W.3d at 709. As discussed above, "actual malice is the making of a statement with knowledge that it is false or with reckless disregard as to its truth." *Street*, 61 S.W.3d at 709 (citing *New York Times*, 376 U.S. at 279-80, 84 S.Ct. at 710). To establish reckless disregard, a public official or public figure must show that the publisher "entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); *accord Huckabee*, 19 S.W.3d at 420; *Street*, 61 S.W.3d at 709.

It was not until 1964, in *New York Times, Inc. v. Sullivan*, that the Supreme Court decided that the First Amendment placed limits on the law of defamation by prohibiting public officials from recovering damages for false statements concerning official conduct absent proof of actual malice. [FN8] 376 U.S. at 279-80, 84 S.Ct. at 725. Since that time, the Court has consistently reiterated that the fundamental importance of the unbridled flow of ideas and opinions on matters of public interest and concern is at the very heart of the First Amendment. *Masson*, 501 U.S. at 510, 111 S.Ct. at 2429; *Hustler*, 485 U.S. at 50, 108 S.Ct. at 879; *Letter Carriers*, 418 U.S. at 273, 94 S.Ct. at 2776. With an eye on protecting the unbridled flow of ideas, the Supreme Court has defined actual malice as the publisher's knowledge that a statement was false or made with reckless disregard for whether it was true or false. *New York Times*, 376 U.S. at 279-80, 84 S.Ct. at 725.

FN8. The actual malice limitation on defamation recovery by public officials was later extended to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967).

[28] [29] [30] Thus, a public official or figure may hold a speaker liable for damaging his reputation through publication of a defamatory falsehood only if that statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.; accord Hustler*, 485 U.S. at 52, 108 S.Ct. at 880. The rationale is that false statements of fact about these figures have no constitutional value. *Gertz*, 418 U.S. at 340, 94 S.Ct. at 3007. Despite the lack of protection afforded defamatory falsehoods, they are unavoidable in public debate, and to "impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value." *Hustler*, 485 U.S. at 52, 108 S.Ct. at 880.

The *Dallas Observer* argues, however, that the *traditional* actual malice standard does not apply to satire or parody. Instead, it advocates a modified actual malice standard employing the use of "the subjective intent to pass off falsity as fact." Proper application of the actual malice standard to asserted satire or parody in a defamation action by public officials is one of first impression in Texas.

A. The Actual Malice Standard

[31] The *Dallas Observer* proposes that, in order to conclusively disprove actual malice, the traditional standard must be altered because of the peculiar nature of ***861** satire and parody as fiction. It reasons that, because

satire and parody are intentionally fictional, neither of those literary devices can successfully overcome the traditional actual malice test, which asks whether the defendant had knowledge that a statement was false or recklessly disregarded whether it was true. In other words, under the traditional test, all satire and parody would be regarded as intentionally false and, therefore, published with actual malice. Thus, the*Dallas Observer* proposes that the test for asserted satire and parody must be whether the defendant subjectively intended for readers to believe that the fiction was fact. Under its no-evidence motion, the *Dallas Observer* argues that **Isaacks** and **Whitten** must come forward with evidence that it intended for readers to believe the fiction was fact.

[32] The constitutional test for actual malice is a subjective test that examines the author's state of mind regarding whether he or she knew a statement was false or made with reckless disregard for its truth. *Hustler,* 485 U.S. at 52, 108 S.Ct. at 880; *St. Amant,* 390 U.S. at 731, 88 S.Ct. at 1325; *New York Times,* 376 U.S. at 279-80, 84 S.Ct. at 725; *Huckabee,* 19 S.W.3d at 420; *Street,* 61 S.W.3d at 709. We disagree that the actual malice test should be altered to require subjective intent to portray fiction as fact in cases involving asserted satire or parody. We believe that the *Dallas Observer's* proposed substitute test improperly raises the level of culpability and, hence, the burden of a plaintiff, from "knowing or reckless disregard" to that of intent to mislead or deceive.
In support of its proposed new test, the *Dallas Observer* references case law from various jurisdictions and commentators who have discussed the application of the traditional *New York Times* actual malice test to satire or parody. The *Dallas Observer* first cites *Dworkin*867 F.2d at 1194. While *Dworkin* acknowledges the apparent

inconsistency of inquiring into the existence of the author's knowledge or reckless disregard of falsity in a case of admitted fiction, it does not support the *Dallas Observer's* proposed test. The court in *Dworkin* concluded that, "if a speaker knowingly publishes a literally untrue statement without holding the statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by *New York Times.*" *Id.* *Dworkin* supports the idea that actual malice is not established simply because a statement is untrue and held out as untrue for the reasonable reader, such as in the context of satire. However, we disagree that *Dworkin* substitutes subjective intent to mislead for knowledge of or reckless disregard for falsity as the level of culpability for *New York Times* actual malice.

The *Dallas Observer* also relies upon the conclusion in *Hoppe* that the *New York Times* actual malice standard cannot be applied where the alleged defamatory expression at issue is satire, humor, or fiction, because "in any such work, it is likely the author did not intend the work to be completely truthful." 770 P.2d at 208. According to the *Hoppe* court, "a different standard has been developed for determining malice in these situations, namely: whether the author intended or recklessly failed to anticipate that readers would construe the publication as a statement of defamatory facts." *Id.* The *Dallas Observer* admits, however, that the *Hoppe* court misstated the second half of the *New York Times* actual malice test.

[33] Finally, the *Dallas Observer* incorrectly cites the recent opinion of the Supreme Court of Texas in *Turner* as holding that actual malice inquires into ***862** what the defendant subjectively intended the reader to perceive. To the contrary, the supreme court held in *Turner* that, to establish actual malice, a public figure must only "present

... evidence that the defendant *knew or strongly suspected* that the publication as a whole could present a false and defamatory impression of events." 38 S.W.3d at 120 (emphasis added) (citing *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir.1997) (holding actual malice requires that defendants know language is misleading)); *see also Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 680 (9th Cir.1990) (concluding defendant must know language choice was misleading); *Huckabee*, 19 S.W.3d at 426 (explaining defendant must know that omission could create substantially false impression). This case is similar to *Turner* in that the same basic issue exists here: Did the publisher either know or strongly suspect that the article was misleading or presented a substantially false impression? We believe the traditional test for actual malice, as articulated in *Turner*, remains both adequate and appropriate in this case.

Application to "Stop the Madness" Article

[34] Because **Isaacks** and **Whitten** must prove actual malice in order to prevail at trial, the *Dallas Observer* is entitled to summary judgment as to any statement on which it can negate actual malice as a matter of law. *Casso*, 776 S.W.2d at 555. The *Dallas Observer* relies on the affidavits of Farley, Williams, and Lyons to disprove actual malice. Farley was the author of the article in question. Williams was the managing editor of the news section, and Lyons was the editor in chief of the *Dallas Observer* at the relevant time. In response, **Isaacks** and **Whitten** rely upon deposition testimony of these Appellants that was before the court at the time of summary judgment.

Farley's affidavit outlines her thoughts in constructing the article and concludes with an express denial of her subjective intent for readers to accept the article as

conveying actual statements of fact. Her affidavit states, in relevant part:

With regard to the November 11 article's description of the fictional events surrounding the fictional 6-year-old girl Cindy Bradley, I never intended that the description of the incident be taken as an account of an actual event. My intent was that the article would, by its content, indicate to the reasonable average reader that it was a satire commenting on the overreaction of public officials in the Christopher Beamon case. I believed that reasonable readers would know that the "Cindy Bradley" incident was fictional, and I never entertained any doubt that reasonable readers would know that the "Cindy Bradley" incident was fictional. I did not believe that I was publishing anything false that purported to be a statement of fact with regard to the article's description of the "Cindy Bradley" incident. I neither knew nor believed that the account of the "Cindy Bradley" incident would likely be understood as stating actual historical fact.

Farley's affidavit further noted, "I had the idea to write something for the *Dallas Observer* that would be a takeoff or satire of the Beamon incident." Farley explained:

I discussed with Patrick [Williams] whether or not we wanted the story to be a "prank" intended to fool readers, or whether the story should be outrageous enough that the readers would be let in on the joke and could tell that the events described were fictional. We agreed that we did not want the story to be a ***863** prank, but rather that it should be constructed so that readers would be attracted to it and then would clearly be signaled that the article was a satire or parody.

The *Dallas Observer* also relies on the Williams affidavit in its effort to negate actual malice. Williams's affidavit indicates that he did additional editing of the "Stop the Madness" piece in an effort to make the article "funnier."

Williams also denies any intent to knowingly make false statements of fact or act with reckless disregard for the truth. He likewise states:

My intent was that the November 11, 1999 article would show the absurdity and high-handedness of the action taken in the Chris Beamon case by carrying it to its logical extreme and to ridicule the panicked reaction of adults to children's behavior in the wake of several episodes of random school violence.

Finally, the *Dallas Observer* relies upon the Lyons affidavit in its attempt to negate actual malice. Lyons's affidavit states that the initial draft needed to be more humorous and more obviously a satire and that she assigned the editing task to Williams. Lyons explicitly denies actual malice with the exact general denial that both Farley and Williams used. Lyons also states, "The intent of the November 11, 1999 article was to make a satirical political comment on some Denton officials' decision to put Chris Beamon in jail because of an objectionable homework assignment. There was no intent that the story of 'Cindy Bradley' be taken as stating actual historical fact."

[35] [36] Much of what is presented in the above-discussed affidavits about the affiants' beliefs concerning how the article would be perceived is conclusory and is therefore not competent summary judgment evidence. *See In re Am. Home Prods. Corp.*, 985 S.W.2d 68, 74 (Tex.1998) (orig.proceeding) (op. on reh'g) (holding that conclusory, uncontroverted opinions and testimony about an issue have no probative value and do not raise a fact issue); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex.1991) (holding that conclusory statements by an expert witness are insufficient to support summary judgment). More importantly, our summary judgment rule allows the

granting of a summary judgment based on uncontroverted testimonial evidence of an interested witness only if the evidence "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *Casso*, 776 S.W.2d at 558 (citing Tex.R. Civ. P. 166a(c)). The affidavits of Farley, Williams and Lyons, are controverted by their deposition testimony.

For example, Farley admitted the article was intended to hold **Isaacks** and **Whitten** up to public ridicule. Her ideas came from published accounts of the Beamon matter. She thought the public officials overreacted to the Beamon matter and believed that Beamon should never have been detained, but she did no investigation into the handling of the Beamon case. She never intended a straight news story. She never interviewed **Isaacks** and **Whitten** and admitted quotes attributed to them were untrue. She denied the story was false, but admitted it was "fictional."

Williams admitted in his deposition that he wrote a response in the "Buzz" column, calling readers who believed the report "cerebrally challenged" and "clueless." He admitted he never considered the possibility that someone might not be able to tell that the article was fictional satire. He also agreed the article was meant as satire or scathing commentary, and that it could be harmful to **Isaacks's** and **Whitten's** reputations.

***864** Lyons, who was responsible for the *Dallas Observer's* overall editorial policy, agreed that no one investigated the Beamon incident. She never considered labeling the article as parody or satire. She later realized that some readers thought that it was real and she changed the heading of the on-line version to "Satire." Lyons agreed that the story would hold these public officials up to public ridicule. Most significantly, Lyons agreed that, in this instance, even intelligent, well-read people could have

been misled by the story, and some were.

[37] The summary judgment evidence leads us to conclude that, in light of the *New York Times* standard as applied in *Turner*, there is evidence raising a genuine issue of material fact that the *Dallas Observer* knew or strongly suspected that the article could be misleading. Therefore, there is evidence that the *Dallas Observer* knew or strongly suspected that when they published the article it was false and defamatory. *See Turner*, 38 S.W.3d at 116; *Huckabee*, 19 S.W.3d at 424. Consequently, we overrule the *Dallas Observer's* third and fourth issues. Having overruled the *Dallas Observer's* second through fourth issues, we overrule their first issue, which was their general complaint that the trial court erred in denying its motions for summary judgment. *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex.1970).

VI. MOTION FOR ATTORNEY'S FEES AND COSTS

[38] By a motion filed after our original opinion was issued, Appellees contend that section 51.015 of the Texas Civil Practice and Remedies Code requires that, since we are affirming the trial court's judgment, we must order the *Dallas Observer* to pay attorney's fees and costs of this interlocutory appeal. We agree and grant Appellees' motion. Section 51.015 provides:

Costs of Appeal

[39] In the case of an appeal brought pursuant to Section 51.014(6), if the order appealed from is affirmed, the court of appeals shall order the appellant to pay all costs and reasonable attorney fees of the appeal; otherwise, each party shall be liable for and taxed its own costs of the appeal.

Tex. Civ. Prac. & Rem.Code Ann. § 51.015 (Vernon

1997). The terms of this statute are mandatory. *Gaylord Broad. Co.*, 7 S.W.3d at 286 (holding court of appeals was required to order media defendant to pay plaintiff's costs and attorney's fees on appeal by defendant where appellate court affirmed trial court's order denying summary judgment); *see also KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 785 (Tex.App.-Houston [1st Dist.] 1998, pet. denied) (holding statute constitutional). Appellants must therefore pay all costs and reasonable attorney's fees of this appeal.

V. CONCLUSION

Having held that genuine issues of material fact exist regarding whether the *Dallas Observer'* s article made false statements of fact and was published with actual malice, we affirm the trial court's order denying the *Dallas Observer'* s motions for summary judgment. We remand to the trial court for a determination of the costs and reasonable attorney's fees of these appeals.

Tex.App.-Fort Worth,2002.

New Times, Inc. v. Isaacks

91 S.W.3d 844, 31 Media L. Rep. 2113

END OF DOCUMENT

APPENDIX NO. 4

NO. 99-20910-158

BRUCE ISAACKS and DARLENE A. WHITTEN	§ IN THE DISTRICT COURT
VS.	§ DENTON COUNTY, TEXAS
NEW TIMES, INC d/b/a DALLAS OBSERVER; DALLAS OBSERVER L P.; ROSE PARLEY, JULIE LYONS and PATRICK WILLIAMS	§ 158th JUDICIAL DISTRICT

ORDER

Came before this Court the Defendants' Motion for Summary Judgment.. After considering the pleadings of the parties, the materials on file, and the argument of counsel, the Court finds as follows:

1. Defendants have moved for summary judgment pursuant to Tex. R.. Civ. P.
166a(c) on the ground that as a matter of law, an average or reasonable reader would understand the article at issue as a satire or parody rather than actual statements of fact about Plaintiff The Court DENIES Defendants' summary judgment motion on this ground, finding a question of fact as to how the reasonable reader would understand the article..

2. Defendants have moved for summary judgment pursuant to Tex. R. Civ. P.
166a(c) on the ground that they have negated as a matter of law the essential element of actual malice. The Court holds

that to establish actual malice, the Plaintiffs must prove that the
Defendants intended the reasonable reader to interpret as actual, literal statements of fact those
portions of the November 11, 1999 article that Defendants contend are parody or satire; taking into account the article as a whole. The Court DENIES Defendants' summary judgment motion on this ground, finding that Plaintiffs require additional discovery on the issue.

3. Defendants have moved for a "no evidence" summary judgment pursuant to I ex. R. Civ, P. 166a(i) on the ground that Plaintiffs have shown no evidence that Defendants acted with actual malice. The Court holds that to establish actual malice, the Plaintiffs must prove that the Defendants intended the reasonable reader to interpret as actual, literal statements of fact those portions of the November 11, 1999 article that Defendants contend are parody or satire, taking into account the article as a whole. The Court DENIES Defendants' no-evidence motion for summary judgment on this issue, on the ground that Plaintiffs have not had adequate time for discovery to attempt to develop such evidence.

4.. Defendants have moved for summary judgment pursuant to Tex.. R.. Civ. P. 166a(c) and 166a(i) on the portions of the article discussing the Christopher Beamon matter. Counsel for Plaintiffs stated in open court during the

hearing on the motion that the Plaintiffs are not suing over the article's account of the Beamon matter.. The Defendants' motion is therefore DENIED as moot.

5. Defendants have moved for summary judgment pursuant to Tex.. R.. Civ. P. 166a(c) on the portions of the article not referring to Plaintiffs on a variety of grounds. Counsel for Plaintiffs stated in open court during the hearing on the motion that Plaintiffs have brought this action on the basis of the statements Defendants claim are parody and satire. The Defendants' motion is therefore DENIED as moot.

6.. Based on the foregoing, the Court rules that the following statements, as identified by the letters used in the parties' appendices to the pleadings regarding their motions for summary judgment, remain at issue in this ease: a, c, e, f g, m, n, o, p. All other statements are not at issue as allegedly defamatory as to Plaintiff, but remain relevant insofar as they provide context in which the above-referenced challenged statements must be read

Signed this 30th day of December,2000.

~~Q .~

JUDGE PRESIDING

NO. 99-20910-158

BRUCE ISAACKS and DARLENE WHITTEN	§	IN THE DISTRICT COURT
VS.	§	DENTON COUNTY, TEXAS
NEW TIMES, INC., dba DALLAS OBSERVER; DALLAS OBSERVER, L.P.; ROSE FARLEY, JULIE LYONS, and PATRICK WILLIAMS	§	158TH JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

On May 18, 2001, hearing was held on the Second Motion for Summary Judgment filed by Defendants New Times, Inc.., d/b/a/ *Dallas Observer;* Dallas Observer, L.P.; Rose Farley; Julie Lyons; and Patrick Williams. Plaintiffs and Defendants each appeared through their respective attorneys of record and announced ready, and the Court proceeded to hear argument on the motion..

Defendants' Second Motion for Summary Judgment requests relief on two grounds. First, Defendants ask the court to grant a "traditional" summary judgment pursuant to Tex.. R Civ. P. 166a(c) on the ground that Defendants have presented with their motion sufficient evidence to negate "actual malice," an essential element of Plaintiffs' claims, as a matter of law. Second, Defendants move for summary judgment under Tex. R. Civ. P. 166a(i) on the ground that P1aintiffs have produced no evidence of "actual malice," an essential element of Plaintiffs' claims.

The court has carefully considered the pleadings, the summary judgment evidence, the deposition testimony, affidavits, interrogatory answers, admissions, and other discovery responses on file, the briefs of the patties and the arguments of counsel. The court finds that Defendants' Second Motion for Summary Judgment should be, and it is hereby in all things
DENED.

Signed this *29th* day of May 2001.

JUDGE PRESIDING

APPENDIX NO. 5

UNITED STATES CONST., AMEND. 1
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom** of **speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TEX. CONST. art. I, §§ 8 & 13 (emphasis added). Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege* .... All courts shall be open, and every person for an injury done him, in his lands, goods, person or *reputation,* shall have remedy by due course of law.

TEX. CONST. art. V, § 1-a.
Willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

TEX. LOC. GOV'T CODE § 87.011(2) (3)
"Incompetency" includes "gross ignorance of official duties" and "gross carelessness in the discharge of those duties." *Id.,* § 87.011(2). See Appendix 5. "Official misconduct means intentional, unlawful behaviour relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure,

refusal, or neglect of an officer to perform a duty imposed by law." *Id.*, § 87.011(3).

TEX. CIV. PRAC. & REM. CODE ANN., § 73.001 (Vernon 1997).

A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

APPENDIX NO. 6

Stop the madness

Ponder officials jail second student; first-grader's report on *Where the Wild Things Are* deemed too violent

By Rose Farley

Do they make handcuffs this small? Be afraid of this little girl.

In the second homework-related arrest in as many weeks, a Denton County juvenile court judge jailed a Ponder student for suspicion of making a terroristic threat after the first-

grader wrote a book report on the children's classic *Where the Wild Things Are*.

Cindy Bradley, a diminutive 6-year-old, was arrested without incident during "story time" at her class at Ponder Elementary School on Tuesday morning. In a court appearance later that day, Judge Darlene Whitten ordered the girl detained for 10 days at the Denton County juvenile detention center while prosecutors contemplate whether to file charges.

"Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction," Whitten said from the bench. "It's time for you to grow up, young lady, and it's time for us to stop treating kids like children."

Cindy, dressed in blue jeans, a Pokémon T-shirt, handcuffs, and ankle shackles, appeared subdued as she stood before Whitten. Sources say courthouse security officers ordered the shackles after they reviewed her school disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet.

"It's not easy finding cuffs that small," said a bailiff, who spoke on the condition that his name not be used. "Fortunately, we ordered a special set last week after that other kid was busted."

That "other kid" is 13-year-old Christopher Beamon, a Ponder seventh-grader whom Whitten ordered detained October 28 after he wrote a graphic Halloween horror story in which he describes shooting a teacher and two students after getting high on Freon. After complaints from parents, Ponder High School Principal Chance Allen called juvenile authorities, who sent sheriff's deputies to remove Christopher from school. He was released after being held five days at the juvenile facility.

Denton County District Attorney Bruce Isaacks said Tuesday that he hasn't decided whether to prosecute Cindy.

If convicted of making a terroristic threat, she could be confined to the Texas Youth Commission until she turns 18. "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits," Isaacks said.
Whitten told reporters that she took action at the request of school officials, who were alarmed by acts of "cannibalism, fanaticism, and disorderly conduct" that Cindy wrote about in her report, titled "*Where the Wild Things Are*: A Book Report by Cindy Bradley."
Cindy received two gold stars and a stamped smiley face for the teacher-assigned report, according to her mother, Karen Bradley.
"I thought the report was good and deserved the stickers it got," the bewildered mother says. "I thought it was a sign that we had turned a corner with Cindy's academic career. God knows what this will do to her permanent record."
Cindy's trouble began Monday morning, when the mother of one of her classmates called school officials to complain that students at Ponder were encouraged to read books that could cause students to think dangerous thoughts. The officials then contacted Dr. Byron Welch, who runs the Denton county school district, who in turn contacted juvenile authorities.
"In this day and age, you never know what students might do, and I can't risk another Columbine," Welch says. "Frankly, these kids scare the crap out of me."
Welch also confirmed reports that school representatives will soon join several local faith-based organizations, including God-Fearing Opponents of Freedom (GOOF), and ask publishers to review content guidelines for children's books.
Written by Maurice Sendak, the 1964 winner of the Caldecott Medal for Most Distinguished Picture Book, *Where the Wild Things Are* is a 37-page book about a boy named "Max" who dresses in a wolf costume and is sent to

his room without supper for making mischief. The most controversial aspect of the book is contained in an early exchange between Max and his mother. It reads:

"His mother called him 'WILD THING!'
and Max said 'I'LL EAT YOU UP!'
so he was sent to bed without eating anything."

Reached on the presidential campaign trail in South Carolina, Gov. George W. Bush said he had not read the book, but was "appalled that such material could find its way into the hands of a Texas schoolchild. This book clearly has deviant, violent, sexual overtones.

"Parents must understand that zero tolerance means just that," he said. "We won't tolerate anything."

In Washington, D.C., the news of Cindy's arrest prompted an immediate outcry from the American Civil Liberties Union, which has offered to provide Cindy with free legal representation.

"Jesus H. Christ, are you people nuts? She's just a kid," said the ACLU's Emily Whitfield, the organization's national spokeswoman, who commented while en route to Dallas with a team of lawyers in tow. "When I was Cindy's age, we sang 'On Top of Old Smokey,' and 'Marijuana, Marijuana, LSD.'"

The schoolyard rhyme "On Top of Old Smokey" refers to shooting a teacher "with a .44-slug." The later dng ditty concludes: "Scientists make it, teachers take it. Why can't we?"

By 5 p.m. Tuesday, the day's events were beginning to take their toll on Cindy, who asked her mom to bring her pink pajamas, the ones with the kangaroos on them, before lights-out.

"I don't get why everyone's so mad," Cindy said in a phone interview from the detention center. "Just 'cause I like how Max told his mom he wanted to eat her up and ran away in

his mind and did a rumpus with the monsters doesn't mean I would do those things."

Cindy scoffed at the suggestion that *Where the Wild Things Are* can corrupt young minds.

"Like, I'm *sure*," she said. "It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

APPENDIX NO. 7

AFFIDAVIT OF DARLENE A. WHITTEN (CR 409)

(Redacted to Conform to Order on Defendants' Objections to Plaintiffs' Summary Judgment Evidence Dated December 30, 2000 (CR 531) and to omit formal and extraneous matter)

1. "My name is Darlene A. Whitten. I am over the age of twenty-one years. I have never been convicted of a felony or a crime involving moral turpitude, and I am fully competent to make this Affidavit. I have personal knowledge of the facts contained in this Affidavit, and the facts are true and correct.

2. I graduated from the Thomas Jefferson High School in Dallas, Texas in 1963. I attended the University of North Texas and received a B.A. degree with honors in 1966. I then attended the University of Texas at Austin and received an M.A. with honors in 1969. I taught English, reading and Latin at the middle school and junior high levels in the Grapevine and Denton Independent School Districts. I attended the Southern Methodist University School of Law and received my J.D. degree in 1980. I was admitted to the Bar and entered the private practice of law where I was engaged from 1980 until 1990. I was an instructor in the University of North Texas Business Department from 1982 through 1990 teaching basic business law and personal law. I also served as Deputy Municipal Judge of the City of Denton, Texas from 1983 to 1985. On October 8, 1990 I was appointed to

fill an unexpired term as Judge of the Denton County Court at Law No. One. I was elected to a four-year term effective January 1, 1991, reelected to a four-year term effective January 1, 1995, and again reelected to a four-year term effective January 1, 1998.

3. Denton County Court at Law No. One is the designated juvenile court for Denton County, Texas. My reputation as a juvenile judge has been such that I have been elected by my peers to serve as a secretary of the Juvenile Law Section of the State Bar of Texas. I was recently inducted as the Chair of that section and currently serve in that capacity. Among the honors that I have received in recognition of my efforts to improve juvenile justice in Denton County and in the State of Texas are recognition by the Dallas Womans Lawyers Association and the San Antonio Women Attorneys Association.

4. On Veteran's Day, November 11, 1999 Christine Dingler, Juvenile Probation officer, came to my courtroom to report to me that juvenile detention was receiving irate telephone calls about a six-year-old girl who was allegedly detained in that facility. I informed her to tell the callers that it was legally impossible to have a six-year-old in juvenile detention. Ms. Dingler's demeanor was one of alarm and she asked me to call Bobbie Hanford of the Denton County Juvenile Probation Department. When I spoke with Bobbie Hanford her demeanor and effect were also that of alarm. She expressed to me concern about the number of calls and the angry tone of

the callers. Ms. Hanford and Ms. Dingler reported to me that some of the calls had been from news organizations, and I requested that any further calls be forwarded to my office.

5. Between 10 and 10:30 a.m. I received telephone calls from Steve Stoller of Fox 4 News television and Rebecca Lopez, of Channel 8 television. Mr. Stoller reported to me that there was a news story in the Dallas Observer stating that I had incarcerated a six-year-old girl. From his demeanor and the tone of his voice I believed him to be seriously inquiring about what he believed to be an actual news story. When I assured him that no such incident had occurred he told me that story was complete with a picture of the girl and quotes from me and other officials. I asked him to fax me a copy of the story and he later did so.

6. Rebecca Lopez of Channel 8 called and asked about the story. She reported to me that a group at her station had been talking about it as if it were real. I asked her to advise them of the truth and she said she would advise her co-workers that the story was fiction.

7. I received a call from Carol Kohanke, a friend. Carol Kohanke reported to me that Charlie Jones, the popular talk show host of KRLD 1080 radio was talking about the story on the air as if it were an actual news item. About this time Bobbie Hanford reported to me that Amy Iverson, producer of the Charlie Jones radio show, had called wanting comment. I returned

the call of Amy Iverson and left a voice message telling her that the story was pure fiction and fabrication.

8. At approximately 2:30 p.m. Judy White of KRLD Channel 4 called to report to me that a group of persons at Channel 4 were discussing the story as if it were fact. I requested that she report to them that it was a fictional story and she said she would do so. There were also calls that day from Benjamin Dover of KLIF radio and Mark Davis of WBAP radio, both popular talk show hosts. I do not believe that I returned either of these calls.

9. In the following days and weeks I learned through e-mails and telephone calls that many people had read the Observer article and believed it, or had heard one of the radio programs and believed that the discussion of the Cindy Bradley matter was about a true event. My office received several calls from citizens expressing outrage at my alleged conduct in shackling and incarcerating a six-year-old child. I received similar calls at my home. I received a voice mail at my office from an irate individual whose name cannot be determined from the voice mail. This woman stated that she was an executive at Boeing Electronics, which is one of the larger and more important high tech employers in Denton County. She stated that she was outraged, that she had substantial influence among Boeing employees, and that she would all do in her power to see that I was not reelected.

10. I requested my husband and attorney, Michael J. Whitten, to write the Dallas Observer to request a retraction and apology. The Observer did subsequently admit that the story was fictional, but they offered no apology and indicated that any readers who had accepted the story as true, as opposed to a "satire" were "clueless."

11. The Observer article of November 11, 1999 has later been put forward as a "satire" designed to ridicule me, District Attorney Bruce Isaacks, and Denton County in general for the detention of a 13 year old child named Christopher Beamon for allegedly turning in a homework assignment which contained a story threatening the lives of his teacher and two fellow students named therein. This matter had been inaccurately reported in the legitimate press at the end of October and first of November, 1999. In its November 11, 1999 article the Observer referred to the Beamon matter when it stated:

    That "other kid" is thirteen year old Christopher Beamon, a Ponder seventh grader whom Whitten ordered detained October 28 after he wrote a graphic halloween horror story in which he described shooting a teacher and two students after getting high on freon."

12. There was a substantial uproar over the Christopher Beamon matter after it was reported in the legitimate press. The reports were inaccurate. Many of the reports stated that I had ordered Mr. Beamon detained for ten days. That

is not true. The reports stated that I had ordered him detained for writing a graphic halloween horror story as a school assignment. That is not true.

13. (Objection sustained as irrelevant).

14. (***omits parts to which objection was sustained). The entire story is false. There is no such child, there was no detention, there were no handcuffs, no book report, no comments by me, Mr. Isaacks, the school superintendent, the governor, Cindy's "mother" or the ACLU. (***).

15. The Observer printed its story in a space customarily reserved for "hard news." It was labeled as "news." It was indexed as "news." In the archives at the Observer web site today if one looks at the article it is labeled "News."

16. The article accuses me of conduct which is both unlawful and reprehensible. I am an elected judge sworn to uphold the Constitution and laws of the State of Texas and of the United States. No child in the State of Texas can be detained for any offense if they are under the age of ten years. No six-year-old child can be detained for any reason in the juvenile justice system. The article in effect accuses me of acting to commit the crimes of official oppression, false arrest, false imprisonment, and violation of the civil rights of Cindy Bradley. The conduct attributed to me in having a six-year-old child handcuffed and shackled amounts to charges of assault and

child abuse. The article charges me with gross malfeasance and misfeasance in office. If the statements made about me in the article were true I would clearly be subject to disciplinary actions that could be expected to result in my suspension or removal from office. The conduct attributed to me, if true, would certainly result in my being disbarred or suspended from the practice of law. (***). These are not just abstract allegations. I have received hateful phone calls and e-mails. I was the subject of an article in the North Texas Daily, which called for my removal from office. Wesley Shakleford, an attorney employed by The Texas Juvenile Probation Commission has been contacted by at least one angry e-mail writer who asked whether I could be removed from office and what could be done about me. (***).

17. (***). Christopher Beamon, a 13-year-old student in the Ponder Independent School District was brought before me on or about the 29th day of October 1999 for the purpose of a detention hearing. A detention hearing is a limited proceeding. Typically no record is made. The duties of the magistrate at the detention hearing are to determine whether there is probable cause to take a juvenile into custody. The function of the magistrate at such a hearing is to review the affidavit of probable cause and determine whether probable cause exists to detain the juvenile. The information before me at the detention hearing concerning Christopher Beamon was not as has been reported in the press, either the legitimate press or the Dallas

Observer. The affidavit before me indicated that on the 28th day of October, 1999 a Ponder High School Assistant Principal had called the Sheriff's Department to report a 7th grade student, Christopher Beamon, who threatened to shoot a teacher and two students in the body of a letter that he wrote and read out loud in reading class. It was reported in the affidavit that the teacher and two students felt threatened by his comments and believed that he might try to harm them. A deputy sheriff was dispatched and met with the teacher and obtained statements from the teacher and students. The so-called "threatening letter" written by Beamon was seized as evidence and Mr. Beamon was taken into custody. That is the substance of the affidavit for probable cause that I had before me. I did not have before me the alleged letter. The charge stated in the affidavit was terroristic threat. There was nothing in the affidavit about any homework assignment or any Halloween essay written by Christopher Beamon. Presented to me were facts, which indicated that a student had written a "letter" threatening to shoot a teacher and two students. I also received information that Christopher Beamon has repeatedly harassed smaller boys, two of whom were threatened with being shot in the "letter." I received information that Christopher Beamon has been a persistent discipline problem for the Ponder Independent School District and that the Principal and teachers were concerned enough to prefer the charges. It is important to note that I made no adjudication of guilt at the detention hearing, nor did I form any opinions about guilt

or innocence. While the charge in the affidavit for probable cause was "terroristic threat" the conduct described would also be consistent with a charge of retaliation against a public servant under Penal Code Art. 36.06 and harassment under Art. 42.07.

18. At the detention hearing Jan Beamon, mother of Christopher Beamon was present. I immediately appointed a competent attorney Kimberly Cawley-McCary, to represent Christopher Beamon. In open court I instructed Ms. Cawley McCary to get with the boy's mother immediately and find out what is going on. Contrary to the report that I ordered Christopher Beamon detained for ten days, I simply ordered him detained. Under Texas law a juvenile cannot be detained for more than 10 days without a release hearing. A juvenile can obtain such a hearing at any time, usually on 24 hours notice or less simply by asking for one. (***). I reviewed the affidavit of probable cause, which had information that stated all the elements of an offense and reported a threat which school officials and common sense indicated should be taken seriously. (***). I had no information before me indicating that the "letter" was actually an assigned school essay, although that would not necessarily be dispositive of the probable cause question.

19. (***).

20. Attached hereto and made a part hereof are some of the e-mails received by or forwarded to me.

APPENDIX NO. 8

AFFIDAVIT OF BRUCE ISAACKS (CR 511)

(Redacted to Conform to Order on Defendants' Objections to Plaintiffs' Summary Judgment Evidence Dated December 30, 2000 (CR 531) and to omit formal and extraneous matter)

21. "My name is Bruce Isaacks. I am over the age of twenty-one years. I have never been convicted of a felony or a crime involving moral turpitude, and I am fully competent to make this Affidavit. I have personal knowledge of the facts contained in this Affidavit, and the facts are true and correct.

22. I graduated from the Joshua High School in Joshua, Texas in 1974. I attended the University of Texas at Arlington and received a B.B.A. degree in 1978. I attended the Baylor University School of Law and received my J.D. degree in 1982. I was admitted to the Bar and was hired by the Office of the Criminal District Attorney in Dallas County, where I worked from1983 until 1989. At the Dallas County DA's office I was promoted several times and when I resigned in 1989 I was a Chief Felony Prosecutor. I was elected to a four-year term as Criminal District Attorney for Denton County, Texas, effective January 1, 1991, reelected to a four-year term effective January 1, 1995, and again reelected to a four-year term effective January 1, 1999. A copy of my curriculum vitae is attached hereto. The statements made in the C.V. are true and correct and I adopt them and incorporate them by reference in this Affidavit.

23. As Criminal District Attorney of Denton County, Texas, it is my responsibility to represent the State of Texas in all felony and misdemeanor prosecutions. My office has one hundred (100) full time and six (6) part time employees, including fifty-one (51) lawyers. Sixteen (16) lawyers are assigned to the full time prosecution of felonies, and fifteen (15) are assigned full time to the prosecution of misdemeanors. In addition I have a Civil Division which represents Denton County and its officials in litigation. My office has a specialized Juvenile unit with three prosecutors. In 1999 there were two thousand one hundred nine (2109) detention hearings and eight hundred sixty eight (868) adjudication hearings in juvenile cases.

24. I first became aware of the story in the Dallas Observer on November 11, 1999. I received a phone call from a very irate man who said he lived in Denton County and he wanted to know if I had "taken leave of my senses". He went on to say he was quite upset that I would prosecute a 6 year old little girl for writing a book report on "Where the Wild Things Are". I told him that I was not prosecuting a 6 year old little girl for anything and asked him where he had gotten that idea. He told me that he did not believe me that he knew better that he had just finished reading the article in the Dallas Observer and he would remember it if I had the nerve to run for reelection. I did not get the man's name but I did get several similar calls on that day. I

immediately went and obtained a copy of the Dallas Observer and I was shocked at the story that had been printed. Later that day I received calls from several news agencies including but not limited to, reporters with television stations channels 4 & 8 as well as reporters from radio WPAP and KRLD. For the next 4 to 6 weeks I was repeatedly questioned and sometimes accosted by citizens or strangers and well known acquaintances including attorneys who wanted to know why we would prosecute a 6 yr. old little girl for a book report. Since the article about Cindy Bradley was in the Dallas Observer I have received numerous expressions of concern, disappointment and outrage from various individuals in audiences when I have given speeches at various civic and business groups in the county. A great majority of the people who have confronted me about the article believed it to be a true news story when they read it.

25. I wrote the Dallas Observer to request a retraction. The Observer did subsequently admit that the story was fictional, but they offered no apology and indicated that any readers who had accepted the story as true, as opposed to a "satire" were "clueless." Strangely, although they admit, "we made it up," they have refused to admit that the story is "false."

26. The Observer article of November 11, 1999 has later been put forward by the Observer as a "satire" designed to ridicule me, Judge Darlene A. Whitten, and Denton County in general for

the detention of a 13 year old child named Christopher Beamon for allegedly turning in a homework assignment which contained a story threatening the lives of his teacher and two fellow students named therein. This matter had been inaccurately reported in the legitimate press at the end of October and first of November 1999. In its November 11, 1999 article the Observer referred to the Beamon matter when it stated:

"That 'other kid' is thirteen year old Christopher Beamon, a Ponder seventh grader whom Whitten ordered detained October 28 after he wrote a graphic Halloween horror story in which he described shooting a teacher and two students after getting high on freon."

27. There was a substantial uproar over the Christopher Beamon matter after it was reported in the legitimate press. The reports were inaccurate. Many of the reports stated that my office had requested Judge Whitten to order Mr. Beamon detained for ten days. That is not true. The reports stated that my office asked that he be detained because he had written a graphic Halloween horror story as a school assignment. That is not true.

28. (sustained as irrelevant)

29. Of course I was not present in the courtroom at Mr. Beamon's detention hearing, and had no actual knowledge of that hearing until after the fact. While I am unhappy with the treatment

that I received at the hands of the legitimate news media with regard to the Christopher Beamon matter, I do understand that the criticism I received is part of the job that I accepted when I ran for public office. The criticism in the Christopher Beamon matter involved a real child and a real detention. There was an actual court proceeding. Although it was not accurately reported, I have no basis for believing that the reporters in the legitimate press acted with actual malice, as that term is constitutionally defined. In other words I do not think those reporters knowingly published falsehoods.

30. (***omits parts to which objection was sustained). The entire story is false. There is no such child, there was no detention, there were no handcuffs, no book report, no comments by me, Judge Whitten, the school superintendent, the governor, Cindy's "mother" or the ACLU. (***).

31. The Observer printed its story in a space customarily reserved for "hard news." It was labeled as "news." It was indexed as "news." In the archives at the Observer web site today if one looks at the article it is labeled "News."

32. The article accuses me of conduct that is both unlawful and reprehensible. I am an elected criminal district attorney sworn to uphold the Constitution and laws of the State of Texas and of the United States. No child in the State of Texas can be detained for any offense if they are

under the age of ten years. No six-year-old child can be detained for any reason in the juvenile justice system. The article in effect accuses me of acting to commit the crimes of official oppression, false arrest, false imprisonment, and violation of the civil rights of Cindy Bradley. The conduct attributed to me in having a six-year-old child handcuffed and shackled amounts to charges of assault and child abuse. The article charges me with gross malfeasance and misfeasance in office. If the statements made about me in the article were true I would clearly be subject to disciplinary actions that could be expected to result in my suspension or removal from office. The conduct attributed to me, if true, would certainly result in my being disbarred or suspended from the practice of law. The statement tends to injure my reputation and to expose me to public hatred, contempt, ridicule, and financial injury, and to impeach my honesty, integrity, and reputation. These are not just abstract allegations. I have received hateful phone calls and e-mails. I was the subject of an article in the North Texas Daily, which called for my removal from office. I was the subject of ridicule, hatred and contempt on radio talk shows.

33. (***). Christopher Beamon, a 13-year-old student in the Ponder Independent School District was brought before the juvenile court on or about the 29th day of October 1999 for the purpose of a detention hearing. A detention hearing is a limited proceeding. Typically no record is made. The duties of the magistrate at

the detention hearing are to determine whether there is probable cause to take a juvenile into custody. The function of the magistrate at such a hearing is to review the affidavit of probable cause and determine whether probable cause exists to detain the juvenile. The role of the Criminal District Attorney's Office at a detention hearing is to present the affidavit of probable cause and such other limited information as might be available so that the magistrate can decide whether to detain a juvenile. The information before my office at the detention hearing concerning Christopher Beamon was not as has been reported in the press, either the legitimate press or the Dallas Observer. The affidavit of probable cause indicated that on the 28th day of October, 1999 a Ponder High School Assistant Principal had called the Sheriff's Department to report a 7th grade student, Christopher Beamon, who threatened to shoot a teacher and two students in the body of a letter that he wrote and read out loud in reading class. It was reported in the affidavit that the teacher and two students felt threatened by his comments and believed that he might try to harm them. A deputy sheriff was dispatched and met with the teacher and obtained statements from the teacher and students. The so-called "threatening letter" written by Beamon was seized as evidence and Mr. Beamon was taken into custody. That is the substance of the affidavit for probable cause that was available to my office at the time of the detention hearing. Neither my office nor Judge Whitten had the alleged letter. The charge stated in the affidavit

was terroristic threat. There was nothing in the affidavit about any homework assignment or any Halloween essay written by Christopher Beamon. Presented to my office were facts, which indicated that a student had written a "letter" threatening to shoot a teacher and two students. My office also received information that Christopher Beamon has repeatedly harassed smaller boys, two of whom were threatened with being shot in the "letter." My office received information that Christopher Beamon has been a persistent discipline problem for the Ponder Independent School District and that the Principal and teachers were concerned enough to prefer the charges. While the charge in the affidavit for probable cause was "terroristic threat" the conduct described would also be consistent with a charge of retaliation against a public servant under Penal Code Art. 36.06 and harassment under Art. 42.07.

34. At the detention hearing Jan Beamon, mother of Christopher Beamon was present. Assistant Criminal District Attorney Debra Bender represented my office. Contrary to the report that my office requested that Christopher Beamon be detained for ten days, my office simply requested that he be detained. Under Texas law a juvenile cannot be detained for more than 10 days without a release hearing. A juvenile can obtain such a hearing at any time, usually on 24 hours notice or less simply by asking for one. (***). I subsequently reviewed the affidavit of probable cause, which had information that stated all the elements of an offense and reported

a threat which school officials and common sense indicated should be taken seriously. (***). We had no information at the time of the detention hearing indicating that the "letter" was actually an assigned school essay, although that would not necessarily be dispositive of the probable cause question. I later learned that the "letter" identified in the affidavit was in fact an essay assigned to Beamon as a homework assignment. Upon consultation with juvenile probation and my staff I determined that my office would not prosecute the charge, and Beamon was released.

35. (***withdrawn).

36. Attached hereto and made a part hereof are some of the e-mails and phone messages received by or forwarded to my office.

Further Affiant sayeth not.

_____

BRUCE ISAACKS

SWORN TO AND SUBSCRIBED BEFORE ME on this _____ day of July 2000 to certify which witness my hand and seal of office.

_____

Notary Public in and for
The State of Texas

APPENDIX NO. 9

Excerpts from Deposition of Charley Jones at 13 (CR 744).
Transcript of Recording of Broadcast Nov. 11, 1999.

> What I have to tell you right now I can hardly believe I'm reading. And if you've seen the – the *Dallas Observer* today, perhaps you will have beaten me to this. But for the second time in as many weeks a Denton County Juvenile Court Judge has put a student from the Ponder ISD in jail for suspicion of making terroristic threats.
>
> Now, are you thinking high school? Don't. Are you thinking junior high? No way. Are you thinking elementary school? Well, almost. We're talking about a six-year old little girl named Cindy Bradley, who was dressed in blue jeans and a Pokemon T-shirt, handcuffs, and ankle shackles as she stood before Judge Darlene Whitten, who ordered her detained for ten days at the Denton County Juvenile Detention Center while prosecutors contemplate filing charges.
> [*Id.* at 20-21 (CR 745-46).